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Supreme Court, U.S.
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In the Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves important and recurring issues concerning application of the First Amendment to politically controversial messages that owners of motor vehicles wish to communicate on specialty license plates affixed to their vehicles. Those questions are:

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that a state's selective refusal to approve a "Choose Life" specialty plate – after approving scores of other specialty plates, some involving controversial subjects – is content rather than viewpoint discrimination and does not violate the First Amendment rights of individuals who would like to express their views in support of adoption and against abortion by displaying the plates on their vehicles.

2. Whether the Seventh Circuit correctly held, in conflict with the Eighth Circuit and *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), that a specialty license plate program that grants standardless authority to approve or reject new messages on plates is not facially invalid under the First Amendment if it vests that licensing authority in a legislative body

RULE 14.1(b) AND 29.6 STATEMENT

In addition to Choose Life Illinois, Inc., petitioners here (plaintiffs below) include the following 15 individuals, all of whom reside in Illinois: Richard Bergquist, Sue Bergquist, James Finnegan, Phyllis Finnegan, Daniel Gura, Sandra Gura, Becky MacDougall, Virginia McCaskey, Thomas Morrison, Bethany Morrison, Dan Proft, Richard Stanek, Jill Stanek, Joseph Walsh, and Carol Walsh.

Choose Life Illinois, Inc., is a non-profit corporation organized under the laws of the State of Illinois. It has no parent corporation and does not issue stock to the public.

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Hildreth v. *Dickinson*, 1999 WL 36603028 (M.D Fla. Dec. 22, 1999) 21

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625 ILCS 5/3-600(a) 3, 4

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Miscellaneous:

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Ertelt, *Virginia Governor Tim Kaine Signs Bill Creating Choose Life License Plates* (Mar. 30, 2009), http://www lifenews.com/state4006.html 9

TABLE OF AUTHORITIES—Continued

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Guggenheim & Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563 (2000) 19

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Motor Vehicle Registration and License Plates: NCSL Transportation Review App. B (2009), http://www.ncsl.org/programs/transportation/AppendB_licenseplate09 htm 22

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Posner & Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) 31

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Teigan & Farber, *Nat'l Conference of State Legislatures, Transportation Review: Motor Vehicle Registration and License Plates* (2007), *available at* http://www.ncsl.org/print/transportation/license-registration07.pdf 22

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 547 F.3d 853. The district court's opinion granting summary judgment (App., *infra*, 34a-55a) is unreported.

JURISDICTION

The court of appeals entered judgment on November 7, 2008, and denied rehearing and rehearing en banc on December 17, 2008. App., *infra*, 1a, 56a-57a. On March 4, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 16. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." Relevant provisions of the Illinois Vehicle Code, 625 ILCS 5/3-101 *et seq.*, are set forth at App., *infra*, 58a-61a.

STATEMENT

Although automobile license plates "are still used for their original purpose of tracking individuals," they have "over the years * * * become a way for Americans, who spend an average of 56 minutes a day in their cars, to express their identity." Marsh, *License To Shill*, LEGAL AFFAIRS, Jan./Feb. 2003, *50, *52. This case involves Illinois's selective refusal to approve petitioners' application for a specialty license plate bearing the words "Choose Life." The district court

held that the state's rejection of the plate, in light of its having approved "approximately 60 designs" bearing "a medley of various special-interest messages" (App., *infra*, 35a), was impermissible viewpoint discrimination The Seventh Circuit reversed. Placing itself in conflict with the Eighth and Ninth Circuits – and with decisions of this Court – the court of appeals held that (a) Illinois's actions did not violate the First Amendment as applied to petitioners' application; and (b) the Illinois specialty plate program is not facially invalid even though it delegates unfettered discretion to the General Assembly to approve or squelch private expression Further review is needed to resolve the deep divisions in the lower courts over how the First Amendment applies to specialty license plates.

A. The Illinois Specialty Plate Scheme

Almost every motor vehicle registered in Illinois must bear a license plate issued by the Secretary of State's Vehicle Services Department. App., *infra*, 35a. When vehicle owners request license plates from the Department, they may select a standard plate or a more expensive "vanity," "personalized," or "specialty" plate. *Id.* at 4a-5a, 35a.[1] Illinois offers a broad selection of specialty plates, including plates denoting that the vehicle owner "is an alumnus of a certain college or university," is "a member of a civic organization," pursues a hobby such as hunting, or supports a particular social cause. *Id.* at 4a, 35a-36a; see *id.* at 52a-55a (listing specialty plates available as of January 2007). Examples in this last category include plates declaring "I am Pet Friendly," "Be An Organ Donor," or

[1] Vanity and personalized plates use an existing plate design, but allow applicants to choose the combination of identifying letters and numbers that will appear on the plate 625 ILCS 5/3-405.1.

"Support Our Troops," (Pet. C.A. Supp. Br 1), and plates expressing opposition to violence or support for the environment. The proceeds from specialty plates typically benefit various non-profit groups that sponsor them, and to a lesser extent help defray the state's administrative processing costs App., *infra*, 5a, 35a-36a.

Illinois law vests in the Secretary of State broad authority to administer and enforce the Illinois Vehicle Code, including the provisions relating to specialty license plates. See 625 ILCS 5/2-101, 5/2-104. Section 5/3-600 of the Vehicle Code imposes several requirements on specialty plates issued since 1990 See 625 ILCS 5/3-600(c) First, it provides that the Secretary "shall not issue a series of special plates unless applications * * * have been received for 10,000 plates of that series," but authorizes the Secretary to reduce that number if the lower number "is sufficient to pay for the total cost of designing, manufacturing and issuing the special license plate." 625 ILCS 5/3-600(a) [2] Second, as amended effective January 1, 2008, Section 5/3-600 provides that "[t]he Secretary of State shall issue only special plates that have been

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[2] Secretary of State Jesse White (respondent here) has issued a "Fact Sheet" stating his policy of reducing the minimum number of plate applications to approximately 800-850. App , *infra*, 62a-63a (reproducing "Fact Sheet"), *id.* at 5a-6a, 37a-38a The Fact Sheet also requires that, before any "new plate category" will be approved by the Secretary, "[l]egislation must be [1] introduced (by a legislator either in the Senate or the House), [2] passed by both chambers, and [3] signed into law by the Governor." *Id.* at 62a; see also *id.* at 5a-6a. These three requirements, the Fact Sheet explains, were necessary to avoid "arbitrarily * * * issuing a new plate category." *Id.* at 62a. In 2007, while this case was on appeal to the Seventh Circuit, Illinois codified the second of these requirements *in a modified form – i e*, "*authoriz[ation]*" (*whether in* the form of legislation or otherwise) by the General Assembly of new specialty plates. *Id.* at 8a.

authorized by the General Assembly." 625 ILCS 5/3-600(a).[3]

B. Petitioners' Unsuccessful Efforts To Win Approval For The "Choose Life" Plate

Petitioner Choose Life Illinois, Inc. ("CLI"), is an Illinois not-for-profit corporation dedicated to promoting the adoption of children and increasing public awareness and education about the importance of adoption. The 15 individual petitioners are Illinois residents who hold leadership positions in, or are members or supporters of, CLI. To further its goals, CLI sought approval in Illinois of a "Choose Life" specialty plate that would support adoption causes. CLI collected more than 25,000 signatures of Illinois citizens who wished to purchase the plates. Between 2001 and 2004, a period in which Illinois authorized specialty plates for various social causes, CLI and several individual petitioners tried repeatedly to persuade the General Assembly to approve the "Choose Life" plate App., *infra*, 1a-2a, 6a, 34a-35a. In an unrebutted declaration submitted in the district court, petitioner Dan Proft detailed these efforts and the hostility with which they were met *Id.* at 64a-67a (reproducing declaration).

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[3] Other provisions of the Vehicle Code regulate the content of specialty and other license plates With certain exceptions, Illinois license plates must indicate the vehicle's registration number, the year for which the registration is issued, and the state's official motto ("Land of Lincoln") and name. 625 ILCS 5/3-412(b). The Secretary may not issue any vanity plates that substantially interfere with law enforcement, are "misleading," or would "create[] a connotation that is offensive to good taste and decency " 625 ILCS 5/3-405.2; see App , *infra*, 60a-61a

C. The Proceedings In The District Court

1. Petitioners filed this lawsuit seeking declaratory and injunctive relief in the Northern District of Illinois. They alleged that Secretary White's refusal to issue the plate was "viewpoint discrimination" in violation of the First Amendment. In the alternative, they advanced a facial challenge contending that the specialty plate scheme impermissibly invited viewpoint discrimination by failing to impose *any* substantive standards on the state's decision to allow a new plate.

Respondent moved to dismiss, arguing among other things that messages on specialty license plates are government rather than private speech and that Illinois was justified in rejecting the "Choose Life" plate because of disagreement with its message. Defs.' Mem of Law in Support of Mot. To Dismiss, at 12 (Sept. 22, 2004) ("the state has an interest in selecting *only* those messages on special plates *it chooses to associate with*, and avoiding messages *it does not endorse*") (emphases added). The motion to dismiss was denied.

2. On cross-motions for summary judgment, the district court held that the state's refusal to issue the "Choose Life" plate violated the First Amendment. App., *infra*, 34a-55a. The court first examined whether the "Choose Life" message constituted private speech, government speech, or hybrid speech. App., *infra*, 40a-48a. Based on its review of the Illinois program, this Court's decision in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), and other decisions involving specialty plates, the district court ruled that "the privately-crafted and privately-funded message on specialty license plates constitutes private speech." *Id.* at 42a-48a.

Next, the district court ruled that the state's rejection of the "Choose Life" plate was based on viewpoint

discrimination. App., *infra*, 49a-51a.[4] "[T]he 'Choose Life' message," the court reasoned, "certainly represents a viewpoint – the pro-life viewpoint" – and the state's "reason for denying the speech is because that viewpoint is controversial." *Id* at 50a. Accepting the explanation offered by the state in its motion to dismiss, the district court observed that "it appears that the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it *does not agree or wish to associate*." *Ibid.* (emphasis added). Moreover, the court reasoned, there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for denying 'Choose Life' on a specialty license plate." *Ibid*.[5] Accordingly, the court ordered respondent to issue the "Choose Life" plate, but stayed its order pending appeal.

D. The Court Of Appeals' Decision

The Seventh Circuit reversed. App., *infra*, 1a-33a. Like the district court, the appellate court first

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[4] In the summary judgment proceedings, the state failed to identify a *single other instance* of the General Assembly's rejecting a specialty license plate on substantive grounds.

[5] The district court's determination that Illinois law and the Secretary's "Fact Sheet" contained "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly and the Governor" (App., *infra*, 37a) was based on the undisputed facts. Respondent admitted that no such standards existed and agreed that his agency was "*aware of no standards that the General Assembly itself has developed or follows* in making the approval decision" for new specialty plates. See Defs.' Response To Plfs.' Statement of Undisputed Facts, at 10 (Dec. 7, 2005) (emphasis added). Ultimately, the district court concluded that there was no need to decide petitioners' facial challenge (or, on the as-applied claim, the nature of the forum). App., *infra*, 37a n.2, 50a-51a.

reviewed the extensive (and conflicting) circuit decisions on the nature of speech on specialty license plates and concluded that the "Choose Life" message was "not government speech." *Id.* at 11a-22a. The Seventh Circuit disagreed, however, with the district court's determination that Illinois had engaged in viewpoint discrimination. Accepting at face value respondent's new assertion on appeal that there was an unwritten, undocumented, and previously unarticulated policy of excluding "the entire subject of abortion" from Illinois's "specialty-plate program" (compare note 5, *supra*), the court of appeals held that Illinois had engaged only in content-based discrimination. App., *infra*, 25a. The Seventh Circuit acknowledged that the Ninth Circuit, in *Arizona Life Coalition, Inc.* v. *Stanton*, 515 F.3d 956 (9th Cir.), cert denied, 129 S. Ct 56 (2008), a case "very much like our own," had reached "the opposite conclusion." App., *infra*, 19a-20a, 25a-26a.

Because content-based discrimination is subject to strict scrutiny in traditional and designated public fora but only to reasonableness review in nonpublic fora, the Seventh Circuit proceeded to examine the nature of the forum created by the Illinois program. App., *infra*, 22a-24a. "Specialty license plates," the court reasoned, "are an unusual species of forum – certainly not a traditional public forum, and we think not a designated public forum, either." *Id.* at 23a. Instead, it concluded, they qualify as a nonpublic forum because *license plates in general* are heavily regulated, have a "primary purpose" of "identify[ing] the vehicle," and "are not by nature compatible with anything more than an extremely limited amount of expressive activity." *Id.* at

23a-24a.[6] The court also held that Illinois's exclusion of any specialty-plate messages touching on "the entire subject of abortion" was reasonable. *Id.* at 25a, 27a-28a.

Finally, the Seventh Circuit rejected petitioners' facial challenge. App., *infra*, 10a n.4. The court said the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid:

> It is axiomatic that one legislature cannot bind a future legislature. The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

Id. at 10a-11a n.4 (citations omitted).[7]

REASONS FOR GRANTING THE PETITION

For a decade, the federal courts have entertained a series of lawsuits involving First Amendment challenges to the decisions of states concerning specialty license plates. Many have involved "Choose Life" plates, which currently are available in 19 states

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[6] In contrast, the district court had identified the "central purpose[s] of the specialty plate program" as being "to raise revenue" for the state and "to allow for some private expression." App., *infra*, 35a-36a, 43a, see also *id.* at 43a ("private expression is an important purpose for specialty plates")

[7] The Seventh Circuit also reasoned that a statutory amendment made while the case was on appeal (see note 2, *supra*) "moot[ed]" the facial challenge to the extent that it targeted the lack of "articulated standards governing * * * the *Secretary's* discretion to authorize new plates," but not with respect to the *legislature's* participation in the scheme. App., *infra*, 10a n.4 (emphasis added).

(and have been approved, but are not yet available, in five additional states).[5] Some cases have been initiated by entities and individuals whose request for a "Choose Life" plate was denied See, *e.g.*, *Arizona Life Coalition, Inc* v *Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008). (To date, Arizona, California, Illinois, Missouri, New York and New Jersey have each been sued in federal court based on such denials) Other cases have been brought by groups challenging a state's selective decision to *approve* a "Choose Life" plate (while not simultaneously approving a "pro-choice" plate). See, *e.g.*, *Planned Parenthood of S.C., Inc.* v. *Rose*, 361 F.3d 786, reh'g denied, 373 F 3d 580 (4th Cir. 2004), cert. denied, 543 U.S. 1119 (2005); *ACLU of Tenn.* v. *Bredesen*, 441 F.3d 370 (6th Cir.), cert. denied, 548 U.S. 906 (2006). (To date, federal cases have challenged "Choose Life" plates approved by Florida, Louisiana, Ohio, Oklahoma, South Carolina, and Tennessee) Many of the lawsuits in both categories have – like this case – included as-applied as well as facial challenges.

The result of this extensive litigation is a patchwork of conflicting decisions, as courts have struggled to determine how expression on specialty license plates should be analyzed under the First Amendment (without the benefit of any guidance from this Court

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[5] See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map as well as approved plate designs) In addition, at least two states have "pro-choice" specialty plates Hawai'i ("Respect Choice") and Montana ("Pro-Family, Pro-Choice") *Ibid* Virginia's governor recently expressed a willingness to approve a "pro-choice" plate See Ertelt, *Virginia Governor Tim Kaine Signs Bill Creating Choose Life License Plates* (Mar. 30, 2009), http://www.lifenews.com/state4006.html. Petitioners have no objection to Illinois approving a "pro-choice" plate.

more recent than *Wooley* v. *Maynard*, 430 U.S. 705 (1977), a compelled-speech case involving an ordinary license plate and New Hampshire's state motto, "Live Free or Die"). In the decision below, the Seventh Circuit joined the Fourth, Eighth, and Ninth Circuits in holding that specialty plates contain private and not purely governmental speech; only the Sixth Circuit in *Bredesen* has taken a contrary view, which the Seventh Circuit expressly rejected. See App., *infra*, 2a & n.1; see also *Roach* v. *Stouffer*, 2009 WL 775581, *4-*8 & n.3 (8th Cir. March 26, 2009) (surveying cases, agreeing with majority view, and explaining that nothing in *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009), changes the analysis); cf *Rose*, 361 F.3d at 794-95 ("Choose Life" plate that originated in legislature and was sponsored by state legislators was hybrid of government and private speech).[9]

Moreover, of the four circuits that have squarely held that specialty license plates contain private speech, two – the Fourth and Ninth – have upheld First Amendment challenges to a state's selective denial or approval of a "Choose Life" plate on the ground that the state's action constituted impermissible viewpoint discrimination. See *Stanton*, 515 F.3d at 968-72; *Rose*, 361 F.3d at 792-95; see also *Sons of Confederate Veterans, Inc.* v. *Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610, 623-27, reh'g denied, 305 F.3d

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[9] The Second and Eleventh Circuits have also suggested, in an unpublished decision and in dicta, respectively, that specialty plates includes some private speech. See *Children First Found., Inc.* v. *Martinez*, 2006 WL 544502, at *1 (2d Cir. Mar. 6, 2006) ("custom license plates involve, at minimum, some private speech") (unpublished), on remand, 2008 WL 4367338 (N.D.N.Y Aug. 3, 2008); *Women's Emergency Network* v. *Bush*, 323 F.3d 937, 945 n.9 (11th Cir. 2003).

241 (4th Cir. 2002) ("*SCV*"). Another of those circuits – the Eighth – recently held Missouri's specialty license plate scheme facially invalid without reaching the as-applied challenge. *Roach*, 2009 WL 775581, at *8-*11. The decision below conflicts with both of these lines of authority by (a) holding that Illinois's selective rejection of the "Choose Life" plate was *not* viewpoint discrimination, and (b) rejecting a facial challenge to Illinois's specialty plate scheme despite that scheme's delegation of standardless discretion to legislators to approve or deny new plates.

As result of these decisions, and in the absence of action by this Court, in the federal courts there are no Speech Clause restrictions on state officials' specialty license plate decisions in Michigan, Ohio, Kentucky, and Tennessee, since specialty plates are treated there as government speech. Selective decisions to deny or approve specialty plates violate the First Amendment in Alaska, Arizona, California, Guam, Hawai'i, Idaho, Maryland, Montana, Nevada, North Carolina, Northern Mariana Islands, Oregon, South Carolina, Virginia, Washington and West Virginia. And – because of the decision below – such selective decisions are constitutional in Illinois, Indiana, and Wisconsin. Moreover, specialty plate schemes that confer standardless licensing authority on legislative bodies (a common feature) violate the First Amendment in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, and in California, see *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), but are permissible in Illinois, Indiana, and Wisconsin. The Court should bring uniformity to this vitally important area of federal law and provide much-needed guidance on new types of

license plates that have been developed since *Wooley* was decided and are ubiquitous around the Nation.

I. This Court Should Resolve The Circuit Conflict Over Whether A State's Selective Denial Of A "Choose Life" Specialty License Plate Violates The First Amendment

The decision below creates or exacerbates several conflicts in the circuits over whether the First Amendment permits a state to deny selectively a "Choose Life" specialty license plate on the ground that its message is politically controversial. This is an important and recurring constitutional question, and the Seventh Circuit decided it incorrectly.

A. There Are Multiple Circuit Conflicts

1. The Seventh Circuit placed itself in conflict with several circuits that have upheld as-applied First Amendment claims indistinguishable from the one in this case. Indeed, the Seventh Circuit acknowledged that "the Ninth Circuit came to the opposite conclusion" in *Stanton*, a case "very much like" this one. App., *infra*, 19a, 25a.

In *Stanton*, the Ninth Circuit reversed a grant of summary judgment for the Arizona License Plate Commission, concluding that the Commission had impermissibly denied an application for a "Choose Life" specialty plate based on the nature of the message expressed on the plate. 515 F.3d at 972. The state argued that it had denied the plate "not because of the viewpoint it expressed but because the state did not wish to entertain specialty plates on *any* aspect of the abortion debate." App., *infra*, 25a; 515 F.3d at 972. The Ninth Circuit rejected that argument and also concluded that "[p]reventing Life Coalition from

expressing its viewpoint out of a fear that other groups would express opposing views seems to be a *clear form* of viewpoint discrimination." 515 F.3d at 972 (emphasis added); App., *infra*, 25a-26a.

2. The sharp disagreement between the Seventh and Ninth Circuits over whether the selective denial of a "Choose Life" plate violates the First Amendment was based, in part, on conflicting interpretations of *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The Ninth Circuit read *Rosenberger* to have "rejected" an argument that was "similar" to Arizona's claim that it had engaged only in content-based, but not in viewpoint, discrimination. 515 F.3d at 971.

In *Rosenberger*, the majority held that a public university violated the First Amendment when it withheld funding to a student publication because the magazine "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. In rejecting the dissent's argument that there was no viewpoint discrimination because the university had limited *all* religious speech, both theistic and atheistic, the majority explained:

> The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar * * *. *If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one.* It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint

Id. at 831 (emphasis added). The Ninth Circuit directly relied on that passage in rejecting Arizona's argument that its licensing scheme did not constitute viewpoint discrimination *Stanton*, 515 F.3d at 971.

The Seventh Circuit expressly disagreed with the Ninth Circuit's reading of *Rosenberger*. App., *infra*, 26a-27a. The Seventh Circuit held that the passage quoted above "actually undermines the Ninth Circuit's conclusion." *Id.* at 27a. "Excluding a faith-based publication from a speech forum because it is *faith based*," the Seventh Circuit reasoned, "is indeed viewpoint discrimination; where all other perspectives on the issues of the day are permitted, singling out *the religious perspective* for exclusion is discrimination based on viewpoint, not content." *Ibid.* (emphasis added). "In contrast, here (and in *Stanton*, too)," the Seventh Circuit reasoned, "the State has effectively imposed a restriction on access to the specialty-plate forum based on subject matter: no plates on the topic of abortion." *Ibid.* In this situation, the Seventh Circuit reasoned, the state "has not disfavored any particular perspective or favored one perspective over another on that subject; instead, the restriction is viewpoint neutral." *Ibid.*

The Seventh Circuit's analysis not only ignores the example of racism given in *Rosenberger* but also misapprehends the university's policy, which excluded both theistic *and atheistic* viewpoints and thus was hardly limited to speech that was "faith based" or reflective of a "religious perspective." In any event, this Court's review is necessary to resolve the disagreement over the meaning of *Rosenberger* and its implications for the dividing line between viewpoint and content-based discrimination.

3 Like the Ninth Circuit, the Fourth Circuit has held that a state's selective rejection (or approval) of a specialty license plate violates the First Amendment. See *SCV*, 288 F 3d at 623-27; *Rose*, 361 F.3d at 794-95. In *SCV*, Virginia had authorized a "Sons of Confederate Veterans" license plate but barred that plate from including a logo or emblem (the Confederate flag) In *Rose*, the South Carolina legislature had authorized a "Choose Life" plate (without, at the same time authorizing a "pro-choice" plate). The Seventh Circuit acknowledged that both *SCV* and *Rose* involved "fairly obvious instances of discrimination on account of viewpoint" (App., *infra*, 25a), but thought they were distinguishable·

> Virginia was not imposing a "no flags" rule; it was prohibiting the display of a specific symbol commonly understood to represent a particular viewpoint. South Carolina was favoring one viewpoint on the subject of abortion over any other.
>
> Here, in contrast, Illinois has excluded the entire subject of abortion from its specialty-plate program.

App., *infra*, 25a. But in *SCV* Virginia made an argument very similar to Illinois's in this case – that the logo proscription was viewpoint neutral because it reflects a ban on "*all* viewpoints about the Confederate flag (which the [state] identifies as a category of 'content' or subject matter) from the special plate forum." 288 F.3d at 623 (emphasis added) (Presumably, then, Virginia also would have barred the use of the Confederate flag with a circle around it and a line through it on a "No Racism" plate.) Unlike the panel

in this case, however, the Fourth Circuit rejected that assertion.[10]

4. The Fourth and Ninth Circuit's *analytical approach* to determining whether a state has engaged in viewpoint discrimination is also markedly different from the Seventh Circuit's approach in this case. The Fourth and Ninth Circuits both began by expressing concern that the state's action was motivated by the nature of the message as politically controversial, noting that such bans on controversial speech too easily lend themselves to impermissible viewpoint discrimination. See *Stanton*, 515 F 3d at 972; *SCV*, 288 F.3d at 624 (pointing to "inherent danger of viewpoint discrimination"); see also *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985) ("[T]he purported concern to avoid controversy * * * may conceal a bias against the viewpoint advanced by the excluded speakers").

Both appellate courts also looked beyond the justifications offered by the state for rejecting or selectively regulating the specialty plates. Both carefully examined the actual limits on expression in the specialty plate program as reflected in the governing statutes and regulations and the record evidence of the state's practices concerning approval of specialty plates. See *Stanton*, 515 F.3d at 972; *SCV*, 288 F.3d at 624-26. Using a similar approach, the district court in this case concluded that Illinois had engaged in viewpoint discrimination. See App., *infra*, 35a-36a, 40a, 44a, 49a-50a (state's "reason for denying the speech" is

[10] The Seventh Circuit's decision also conflicts with other decisions See, *e.g.*, *Sons of Confederate Veterans, Inc* v. *Glendening*, 954 F. Supp. 1099, 1103 (D. Md. 1997); *Pruitt* v *Wilder*, 840 F. Supp. 414 (E.D. Va. 1994) (vanity plate case involving rejection of "GODZGUD" plate).

that the plate's message "is controversial"; there are "no general guidelines or rules" in Illinois "on restricting speech in a viewpoint neutral way that would account for" denying the plate; and record showed that approximately 60 plates "bear[ing] a medley of various special-interest messages" had been approved whereas state has presented "no evidence that the General Assembly" had ever "exercised its discretion in denying a specialty plate").

The Seventh Circuit's approach could hardly be more different. The panel expressed no concern that the state's justification for rejecting the "Choose Life" plate hinged on the politically controversial nature of the plate's message. It accepted uncritically the state's new assertion on appeal that denial of the "Choose Life" plate reflected an undocumented policy in the General Assembly of excluding "the entire subject of abortion" from the specialty plate program. But see App., *infra*, 30a (Manion, J., concurring) (expressing "reservations" about lead opinion's statement that "it is undisputed" that Illinois has excluded "the entire subject of abortion"; noting that "[t]his is nothing more than the Illinois legislature rejecting efforts to approve a single specialty license plate, 'Choose Life.'"). The panel also ignored the fact that the state's new assertions on appeal (1) contradicted the state's admission in the trial court that it was *aware of no standards employed by the General Assembly* (see note 5, *supra*); and (2) were inconsistent with the record evidence, which showed that the General Assembly had used a special ad hoc hearing procedure that would have been unnecessary if there had actually been a policy of excluding the "entire subject of abortion" from specialty plates. App., *infra*, 64a-67a. As if that were not enough, the panel also ignored respondent's history

in this litigation of offering conflicting justifications for the General Assembly's rejection of the plate [11] Finally, the Seventh Circuit also failed to consider the evidence concerning the state's statutes, regulations, and permissive historical practice of approving plates – all of which severely undercut the supposed "exclusion" claimed by the state. See page 16 and notes 4-5, *supra*.

5. The Seventh Circuit's conclusion that specialty plates are a nonpublic forum and its determination that the exclusion of the "Choose Life" plate was reasonable also conflict with the decisions of other courts. Although most courts entertaining specialty-plate cases have (like the district court here) avoided deciding the nature of the forum because they have found viewpoint discrimination (or resolved the case on other grounds), several courts and commentators have concluded that specialty plates should be treated as a designated

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[11] The state's explanations have shifted repeatedly. As previously noted, in the trial court respondent first took the position that the plate was rejected because the state disagreed with its message See page 5, *supra*. After petitioners pointed out that this was tantamount to a confession of viewpoint discrimination, respondent shifted gears and argued that in fact "he had *no knowledge* concerning why the legislature approved, or did not approve, specific specialty plates " Defs.' Motion To Alter or Amend The Judgment, at 7 (Feb 6, 2007) (emphasis added); see also note 5, *supra*. In the appellate court, respondent found the missing knowledge and argued that the "Choose Life" plate was rejected because it involved the "politically sensitive" topic of "abortion" and the General Assembly had in fact excluded the entire "subject of abortion." Resp. C.A. Op. Br. 31. In his reply brief and at oral argument, respondent's shape-shifting continued he suggested that the zone of exclusion might not be "abortion" but instead "reproductive rights" (which, as Judge Manion correctly observed, is much broader) Compare Resp C.A. Reply Br 2 (the "topic" and "issue" of abortion) with *id.* at 3 ("the topic of reproductive rights"). See also Oral Arg. Audiotape, at 1 03-22, 14 56-15:37, *available at* http://www.ca7 uscourts gov.

public forum. The *SCV* district court, for example, reached that conclusion based on a careful examination of the relevant factors set out in *Cornelius* 473 U.S. at 802, including the government's policy and practice, the nature of the property, and the compatibility of the place with the expressive activity at issue. See *Sons of Confederate Veterans* v. *Holcomb*, 129 F. Supp. 2d 941, 947-49 (W.D. Va. 2001), aff'd on other grounds, 288 F.3d 610 (4th Cir. 2002). Thus, the *SCV* district court emphasized that Virginia's policy and practice had been to approve a "wide range of specialty plates" and there was a close nexus between "the expression sought and the forum created." 129 F. Supp. 2d at 948. Because creation of the specialty plate program represented Virginia's "intentional action to open up a non-traditional forum for public discourse," that program was "precisely the type of designated public forum contemplated by the Court in *Cornelius*." *Ibid.*[12]

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[12] See also Berry, *Licensing A Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1624-30 (2002) (specialty plates should be treated as designated public forum, "the 'Choose Life' plates involve an intentional effort by the states to open a nonpublic forum, the standard state license plate"), Guggenheim & Silversmith, *Confederate License Plates at the Constitutional Crossroads: Vanity Plates, Special Registration Organization Plates, Bumper Stickers, Viewpoints, Vulgarity, and the First Amendment*, 54 U. MIAMI L. REV. 563, 577-79 (2000) (specialty plates should be considered designated or limited public forum but vanity plates should be considered nonpublic forum). The Eighth Circuit has expressed "skepticism about characterizing a license plate as a nonpublic forum," explaining that "a [vanity] plate is not so very different from a bumper sticker that expresses a social or political message" and "[t]he evident purpose of such a 'forum[]' * * * is to give vent to the personality, and to reveal the character or views, of the plate's holder." *Lewis* v. *Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (dicta), cert. denied, 535 U.S. 986 (2002).

Similarly, the Ninth Circuit held in *Stanton* that Arizona had "open[ed] up its license plate forum" "to a certain class of organizations," thereby creating a "limited public forum," and had acted unreasonably in rejecting the "Choose Life" plate. 515 F.3d at 969-73. In concluding that Arizona's specialty plate program was "limited," the Ninth Circuit relied on certain access restrictions in the Arizona scheme that had been consistently applied and that have no analogue in Illinois. *Id.* at 970. Faced with a scheme such as Illinois's, the Ninth Circuit likely would have held the specialty plate program to be an ordinary "designated public forum." What is more, the Ninth Circuit in *Stanton* ruled that it was *unreasonable* for Arizona to deny the "Choose Life" plate because the state's reasons (identical to Illinois's reasons in this case) were "not statutorily based or related to the purpose of the limited public forum." *Id.* at 972-73. So, too, here. Yet the Seventh Circuit came to the opposite conclusion, concluding that Illinois's rejection of the "Choose Life" plate was reasonable. App., *infra*, 24a, 27a-28a.

6. Finally, if review is granted, respondents presumably will renew their principal argument in the lower courts: that specialty license plates represent *government* rather than private speech. Although the Seventh Circuit has joined the Fourth, Eighth, and Ninth Circuits in squarely rejecting that argument, the Sixth Circuit has taken a contrary view. See App., *infra*, at 11a-22a, 40a-48a; see also *Roach*, 2009 WL 775581, *3-*7; *Rose*, 373 F.3d at 582-89 (Shedd, J., joined by Williams, J., dissenting from denial of rehearing en banc) (arguing that specialty plates are government speech). Thus, further review is likely to provide an occasion for this Court to resolve this entrenched and important circuit conflict as well.

B. The Issues Raised By Petitioners' As-Applied Challenge Are Recurring And Important

As the many cases cited above demonstrate, the constitutionality of a state's selective treatment of a "Choose Life" specialty license plate is a recurring issue.[13] "Choose Life" plates have been approved in 24 states, and efforts are underway to gain approval in at least 14 more states. See Choose Life, Inc., http://www.choose-life.org/states.htm (last visited Apr. 15, 2009) (displaying map). Hawai'i and Montana have "pro-choice" plates, and there have been efforts to gain approval of "pro-choice" plates in at least six other states. *Ibid.*; see Daffer, *A License To Choose Or A Plate-ful of Controversy? Analysis of the "Choose Life" Plate Debate*, 75 UMKC L. REV. 869, 891-92 (2007). All of this activity and litigation has occurred since 1999, when Florida became the first state to approve a "Choose Life" plate. Daffer, 75 UMKC L. REV. at 871-72.

Moreover, similar issues have arisen in cases involving other potentially controversial specialty license plates. See, *e.g.*, *SCV*, 288 F.3d at 613-29; *Glendening*, 954 F. Supp. at 1103; *Summers* v. *Adams*, 2008 WL 5401537 (D.S.C. Dec. 23, 2008) (First

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[13] Other cases not cited above involving "Choose Life" plates include *Hill* v. *Kemp*, 478 F.3d 1236 (10th Cir. 2007), on remand, 2008 WL 822070 (N.D. Okla. 2008); *Children First Found., Inc.* v. *Legreide*, 2005 WL 3088334 (D.N.J. Nov. 17, 2005), vacated, 259 Fed. App'x 444 (3d Cir. 2007); *NARAL Pro-Choice Ohio* v. *Taft*, 2005 U.S. Dist. LEXIS 21394 (N.D. Ohio Sept. 27, 2005), appeal dismissed, Order (6th Cir. Sept. 14, 2006) (No. 05-4338); *Henderson* v. *Stalder*, 112 F. Supp. 2d 589 (E.D. La. 2000), rev'd and remanded, 287 F.3d 374 (5th Cir. 2002), on remand, 265 F. Supp. 2d 699, stay denied, 281 F. Supp. 2d 866 (E.D. La. 2003), vacated, 407 F.3d 351 (5th Cir. 2005); and *Hildreth* v. *Dickinson*, 1999 WL 36603028 (M.D. Fla. Dec. 22, 1999).

Amendment challenge to "I Believe" specialty license plate). Specialty plate programs exist in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. See Teigan & Farber, *Nat'l Conference of State Legislatures, Transportation Review: Motor Vehicle Registration and License Plates*, at 22-25 (2007) *available at* http://www.ncsl.org/print/transportation/license-registration07.pdf; see also *Motor Vehicle Registration and License Plates: NCSL Transportation Review* App. B (2009), http://www.ncsl.org/programs/transportation/AppendB_licenseplate09.htm (listing jurisdictions and updated number of approved specialty plates). By last count, more than 4,325 specialty plates were available nationwide (*ibid.*), and that number continues to grow. Most if not all states also offer vanity or personalized plates, which regularly give rise to similar First Amendment challenges. Teigan & Farber, *supra*, at 8 (describing ACLU litigation against South Dakota for seeking to recall "MPEACHW" plate); see also notes 10, 12, *supra*.

Finally, the Seventh Circuit's decision exacerbates conflicts and confusion in the lower courts over three embedded doctrinal issues that have significance far beyond the extensive litigation over "Choose Life" plates: (1) the proper line between viewpoint and content-based discrimination; (2) the proper forum analysis of specialty license plates; and (3) the proper line between government and private speech. These issues are of surpassing importance to the public and to government officials across the Nation. See *SCV*, 305 F.3d 241, 247-48 (4th Cir. 2002) (Niemeyer, J., dissenting from denial of rehearing en banc by 6-5 vote) (arguing that case involves an "important First Amendment issue" on which the circuits have "taken different analytical courses"); *id* at 253 (Gregory, J.,

dissenting from denial of rehearing en banc) (the "issues presented here are important").

C. The Decision Below Is Wrong

The Seventh Circuit was wrong in rejecting petitioners' as-applied First Amendment challenge. The panel also erred in each step of its analysis (except, of course, for its threshold determination that specialty license plates are not government speech).

1. Illinois's rejection of the "Choose Life" plate is viewpoint discrimination. As *Rosenberger* makes clear, the exclusion of several different viewpoints on the issue of abortion – no less than on the issue of racism – constitutes viewpoint and not merely content-based discrimination. The Seventh Circuit's efforts to distinguish *Rosenberger* were unavailing. See page 14, *supra*. Moreover, as explained above, the panel erred both in (a) accepting uncritically the state's assertion that it was following an unwritten policy of excluding the "entire subject of abortion" from the specialty plate program; and (b) failing to consider the substantial record evidence contradicting or undercutting the state's assertion. See pages 17-18 & notes 4-5, 11, *supra*.

2. Specialty license plates are properly treated as a designated public forum, as other courts (and several commentators) have concluded. See pages 17-19 & n.9, *supra*. Illinois, like most other states, has intentionally opened up its license plates – which are borne by privately owned vehicles and historically served only to facilitate vehicle identification – to create a forum for public discourse and private expresssion. As the Seventh Circuit acknowledged, specialty plates "serve as 'mobile billboards' for the organizations and like-minded vehicle owners to promote their causes."

App., *infra*, 21a; accord *Wooley*, 430 U.S. at 715 (comparing license plate to a "mobile billboard" and noting that driver communicates its message "as part of his daily life" and "indeed constantly while his automobile is in public view"). Thus, the "policy and practice of the government" in freely approving scores of specialty plate designs (see note 4, *supra*), "the nature of the property" (a mobile billboard selected by the vehicle owner), and specialty plates' "compatibility with expressive activity" all confirm that specialty plates are a designated public forum. App., *infra*, 23a; see also pages 5-7, *supra*.

The Seventh Circuit was able to reach a contrary decision only by redefining the relevant forum as *license plates generally* rather than specialty plates. App., *infra*, 24a. The Seventh Circuit erred by shifting its focus away from specialty plates. This also created internal inconsistencies in the court's opinion, since the Seventh Circuit's analysis of the government speech issue had instead focused on specialty plates. As the district court correctly recognized, the primary purpose of specialty plates includes permitting vehicle owners to engage in expression. See note 6, *supra*. Because specialty plates are designated public fora, content-based restrictions on them are subject to strict scrutiny. Tellingly, Illinois has never suggested that its rejection of the "Choose Life" plate could survive strict scrutiny.

Finally, even if specialty plates are a nonpublic forum, the Seventh Circuit erred in concluding that Illinois's rejection of the "Choose Life" plate was reasonable. Reasonableness must be evaluated not in the abstract but "*in the light of the purpose of the forum* and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809 (emphasis added). Because the purposes of

specialty plates are to raise revenue for the state and sponsoring organizations and to permit private expression, the crucial question is whether excluding "the entire subject of abortion" serves those purposes. Plainly, it does not. The Seventh Circuit was therefore mistaken in concluding that, "[t]o the extent that messages on specialty license plates are regarded as approved by the State, it is reasonable for the State to maintain a position of neutrality on the subject of abortion." App., *infra*, 28a.[14] Indeed, the premise underlying that rationale – that specialty plates are "reasonably viewed as having the State's stamp of approval" (*id.* at 27a) – is highly dubious, as the Eighth Circuit recently noted.[15] It is especially dubious here, because Illinois has repeatedly refused to issue the "Choose Life" plate and has vigorously defended this litigation – a fact that would be apparent to any "fully informed observer."

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[14] There is further reason to be skeptical of respondent's claim that Illinois wishes to avoid abortion-related or reproductive-rights-related specialty plates because they involve subjects that are too politically divisive or controversial. Two months after rehearing was denied in this case, respondent announced the availability of "special event" license plates bearing the words, "Illinois Salutes President Barack Obama." Press Release, at 1 (Feb. 13, 2009), *available at* http://www.cyberdriveillinois.com/press/2009/february/090213d1.html.

[15] *See Roach*, 2009 WL 775581, at *7-*8 (concluding that "a reasonable and fully informed observer" would "understand that the vehicle owner took the initiative to purchase the specialty plate and is voluntarily communicating his or her own message, not the message of the state"); *id.* at *7 (noting with respect to the 'ARYAN-1' plate at issue in *Lewis* that "[n]o reasonable observer would believe that the State of Missouri is endorsing white supremacy").

II. This Court Should Resolve The Conflict Over Whether A Standardless Licensing Scheme Survives A Facial Challenge If It Delegates Licensing Authority To A Legislative Body

Petitioners' facial challenge targeted the complete absence in the Illinois Vehicle Code and in the Secretary's administrative policy (as stated in his "Fact Sheet") of *any* substantive criteria or guidelines that would govern the state's decision to approve or reject new specialty plates. App., *infra*, 10a-11a n.4, 37a n.2. This standardless discretion over the licensing of private expression, petitioners maintained, violated the First Amendment under a long line of this Court's decisions. See, *e.g.*, *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 393-94 (1992); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988) (condemning as a prior restraint); *Nietmotko* v. *Maryland*, 340 U.S. 268, 273 (1951), *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).[16]

The district court had no occasion to reach the facial challenge, but it did observe (based on the undisputed facts) that there were "no substantive criteria or guidelines for the approval of the specialty license plates by the General Assembly" and that respondent "has not explained why delegating his authority to approve requests [to the General Assembly] protects him from constitutional review of his actions." App., *infra*, 37a n.2; note 5, *supra*. By the time the case reached the Seventh Circuit, the state had come up with an explanation, contending that,

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[16] While this case was pending on appeal, Illinois amended its Vehicle Code. See note 2, *supra*. But the amendment did nothing to provide any substantive standards or guidelines to channel the General Assembly's unfettered discretion to permit or stifle the messages on specialty license plates.

"[a]s the ultimate repository of legislative power in Illinois," the General Assembly "cannot be ordered to impose on itself prospectively binding standards" because any such "prescriptive standards" "cannot limit the exercise of that power by future sessions of the General Assembly." Resp. C.A. Op. Br. 42, 43.[17]

Crediting this new-found argument, the Seventh Circuit summarily rejected petitioners' facial challenge. App., *infra*, 10a n.4. It reasoned that the absence of standards governing "the *state legislature's* discretion to authorize new plates" (*ibid.* (emphasis added)) did not render the licensing scheme facially invalid because:

> It is axiomatic that one legislature cannot bind a future legislature. *Vill. of Rosemont* v *Jaffe*, 482 F 3d 926, 937-38 (7th Cir. 2007) (citing *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932)). The General Assembly is entitled to authorize specialty plates one at a time. It is not required to – and cannot – adopt "standards" to control its legislative discretion.

App., *infra*, 10a-11a n.4. This aspect of the Seventh Circuit's decision independently warrants review.

A. The Seventh Circuit's Holding Conflicts With Decisions Of This Court, The Eighth Circuit, And Other Lower Courts

The Seventh Circuit's rejection of the facial challenge is inconsistent with a subsequent decision of the Eighth Circuit, *Roach* v. *Stouffer*, 2009 WL 775581

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[17] Contrary to the state's suggestion, petitioners never requested that the lower court "order" the General Assembly to adopt standards. They simply sought to enjoin the operation of the standardless program already in existence. Pet. C.A. Br. 43-44.

(8th Cir. Mar. 26, 2009), which invalidated on its face a Missouri specialty license plate scheme that delegated approval authority to a joint legislative Committee on Transportation Oversight (consisting of seven state senators, seven state representatives, and three non-voting *ex officio* members). After the Committee denied an application for a "Choose Life" plate, the rejected applicant – Choose Life Missouri – and its president brought suit. Both the district court and the Eighth Circuit held that the licensing scheme was facially invalid because it "provide[d] no standards or guidelines whatsoever to limit the unbridled discretion of the Joint Committee." 2009 WL 775581, at *8. The Eighth Circuit rejected the state's argument that the result should be different because "the only voting members of the Joint Committee are *legislators*, not administrators or hired state employees," explaining that any immunity from suit for legislators would apply only to suits against officials sued in their individual capacities (not, as here, in their official capacities). *Id.* at *9; see also *Lewis*, 253 F.3d at 1078-83 (Eighth Circuit held that Missouri vanity plate scheme with vague approval standards is facially invalid).

The Seventh Circuit's creation of a novel "legislative body" exception to the long line of authority condemning standardless licensing schemes is equally incompatible with this Court's decisions. In *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), this Court invalidated the conviction of civil rights protesters for violating an ordinance that required a permit from the City Commission to participate in a parade or public demonstration. The Commission was "the City's legislative body." *Shuttlesworth* v. *City of Birmingham*, 180 So. 2d 114,

126-27 (Ala. Ct. App. 1965); accord *Henderson* v. *Stalder*, 287 F.3d 374, 389 n.9 (5th Cir. 2002) (Davis, J., dissenting). Even though the permitting authority was a legislative body, this Court had no difficulty concluding that the city ordinance "conferr[ing] upon the City Commission virtually unbridled and absolute power" to prohibit parades or demonstrations "*fell squarely within the ambit* of the *many* decisions of this Court over the last 30 years, holding that [a standardless licensing scheme] is unconstitutional." 394 U.S. at 150-51 (emphasis added); see also *Niemotko*, 340 U.S. at 273-74 (reaching same conclusion in case where permit applications were customarily made to Park Commissioner and, if he denied them, to City Council).

Finally, other lower federal and state courts have likewise rejected the "legislator" or "legislative body" exception embraced below. In *The Women's Resource Network* v. *Gourley*, 305 F. Supp. 2d 1145 (E.D. Cal. 2004), for example, the district court held that California's specialty plate scheme was facially unconstitutional because the state legislature had been given unbridled discretion to issue new plates. The court explained that "[l]eaving that authority directly in the hands of the legislature does not change the analysis." *Id.* at 1153 (internal quotation marks omitted). Similarly, the district court in *Rose* held that South Carolina's specialty license scheme was facially invalid because it granted "uncontrolled discretion" to "the legislature" to decide which plates to approve. *Planned Parenthood of S.C., Inc.* v. *Rose*, 236 F. Supp. 2d 564, 573 (D.S.C. 2002), aff'd on other grounds, 361 F.3d 786 (4th Cir. 2004); see also *Henderson* v. *Stalder*, 265 F. Supp. 2d 699, 719 (E.D. La. 2003) (Louisiana prestige plate licensing scheme facially

unconstitutional where legislature was decisionmaker, and there were "no standards, parameters, guidelines or other criteria by which a prestige plate c[ould] be issued"), rev'd on other grounds, 407 F.3d 351 (5th Cir 2005), *Stalder*, 287 F 3d at 388-89 (Davis, J., dissenting) ("Leaving that [standardless] authority directly in the hands of the Louisiana legislature should not change the analysis"); *Shuttlesworth*, 180 So. 2d at 127 ("'[T]he rule is no different where the legislative body reserves for itself the administration of the licensing power.'") (quoting *ACLU v. Town of Cortlandt*, 109 N.Y.S.2d 165 (N.Y Sup 1951))

B. The Issues Raised By Petitioners' Facial Challenge Are Recurring And Important

As the cases cited in the previous section show, the facial validity of standardless specialty license plate schemes is an issue that arises with considerable frequency. Indeed, many of the cases involving "Choose Life" license plates have raised both as-applied and facial challenges. The reported decisions understate the frequency with which the issue arises, because many cases have been resolved on alternative grounds. Because 24 states have approved the "Choose Life" plates and approval is being sought in another 14 jurisdictions, litigation over this question can be expected to continue – and be fueled by the Eighth Circuit's recent decision in *Roach*. And, of course, the issue can be expected to arise in litigation involving other types of specialty plates as well.

As noted above, all states have specialty license plate schemes. Many of these schemes grant standardless licensing authority to the legislature or to other government officials. See Daffer, *supra*, 75 UMKC L. REV. at 893 (28 states now require legislative

approval before specialty plates can be used, whereas 19 states have a purely administrative process; some states have both methods of approval). Similarly, state schemes authorizing *personal or vanity* plates often contain vague or indeterminate standards governing approval decisions. See, *e.g.*, *Lewis*, 253 F 3d at 1078-83 The issue thus has implications for a broad range of state programs. And the facial validity under the First Amendment of these licensing schemes is clearly an important question. Finally, if permitted to stand, the Seventh Circuit's rationale for upholding an admittedly standardless licensing scheme for private expression – *i.e.*, one legislature cannot bind a future legislature – could invite imitation in a wide range of other settings where standardless schemes chill expression.

C. The Seventh Circuit's Decision Is Wrong

The Seventh Circuit's terse departure from the foregoing precedents was evidently based on its view that, to implement licensing standards sufficient to survive a facial challenge, a legislative body must bind itself *permanently* to a particular set of substantive criteria for approving specialty plates. Such a requirement, the Seventh Circuit reasoned, might violate the so-called rule against legislative entrenchment, under which "the will of a particular Congress * * * does not impose itself upon those to follow in succeeding years." *Reichelderfer*, 287 U.S. at 317-18 (involving validity of statute purporting to "perpetually dedicate[]" Rock Creek Park to certain uses); see also *United States* v. *Winstar Corp.*, 518 U.S 839, 872 (1996); Posner & Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L J. 1665 (2002) (arguing that the principle is invalid and should be abandoned). But the Seventh Circuit's reasoning is flawed for at least three reasons.

First, to create a constitutional licensing system complete with substantive standards to guide decisionmaking, a legislature need not entrench criteria against future repeal (such as by requiring that changes be made only by a supermajority of a future legislature). Instead, it need only enact neutral, non-entrenched standards and apply them in good faith until (if ever) it formally adopts different ones for reasons unrelated to a specific application. At bottom, the Seventh Circuit relied on a faulty syllogism, which posits that: (1) standards are meaningless *unless* they are entrenched; (2) legislative entrenchment is impermissible; thus (3) standards that meaningfully curb legislative discretion are impermissible and cannot be required. That reasoning gets off on the wrong foot

Second, the rule against legislative entrenchment applies only to the "legislative authority" of future legislatures. *Winstar*, 518 U.S. at 872. It is far from clear that the discretionary authority to decide who may speak in the specialty plate forum, authority delegated to the "General Assembly" by Illinois statute, implicates the General Assembly's lawmaking powers. The same licensing authority, if conferred on the Secretary of State, clearly would *not* involve "legislative" authority. Why should the decision to delegate that authority to a legislative body alter that conclusion? See *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 477 (1983) ("[T]he nature of a proceeding depends not upon the character of the body but upon the character of the proceedings.") (internal quotation marks omitted).

Third, even entertaining the dubious assumption that federal law enshrines the rule against entrenchment as a protection of the prerogatives of

state legislatures, the rule could hardly trump the First Amendment (or the power of the federal courts to remedy a constitutional violation). See *Winstar*, 518 U.S. at 872-73 (unlike Parliament, where rule originated, "the power of American legislative bodies * * * is subject to the overriding dictates of the Constitution" with which the rule "has always lived in some tension"). The exact same threat to freedom of expression posed by standardless licensing schemes – and condemned by the First Amendment – exists when unfettered licensing authority is delegated to a legislative body.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 08-1283

In the
Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., *et al.*,
PETITIONERS,

v.

JESSE WHITE, ILLINOIS SECRETARY OF STATE,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Through the passage of successive laws, the Illinois legislature has created various specialty license plates for motor vehicles (*e.g.*, plates honoring members of the military and elected officials, and plates supporting environmental protection), but has not enacted any law creating a specialty plate expressing a view—pro-life, pro-choice, or otherwise—on the subject of abortion.

The question presented is:

Where the Illinois legislature creates every new specialty plate by passing a separate law specifically authorizing that plate, did the court of appeals correctly hold that the absence of any law creating a plate on the subject of abortion is not discrimination against a particular viewpoint, and that there is no merit to petitioners' facial challenge to Illinois's method of creating specialty plates, where that challenge was inadequately developed below, petitioners lack standing to advance it, and no Supreme Court or appellate court authority supports it?

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BRIEF IN OPPOSITION

The petition for certiorari should be denied. A change in the Illinois statute governing speciality license plates, enacted while this case was on appeal, has forced petitioners to concede that this was not the case they thought it was when they filed suit. Petitioners now admit, contrary to their legal position before the district court and the Seventh Circuit, that respondent does not decide what new specialty plates are created in Illinois. Only the General Assembly may authorize new plates, which it does by enacting a new law for every plate. Accordingly, this is not the case of an administrative body refusing to issue a plate satisfying a State's preset, statutory criteria. Rather, it is the case of a legislature declining to pass a new law authorizing a plate on a controversial topic never before made the subject of Illinois plates.

This distinction was not only dispositive of the analysis and ultimate judgment below, but it means that this case implicates none of the claimed "splits" in authority that petitioners allege. They contend that the decision below is in conflict with the Ninth Circuit's recent decision in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir.), cert. denied, 129 S. Ct. 56 (2008). But in sharp contrast to Illinois's reliance on case-by-case, legislative lawmaking to authorize new plates, *Stanton* involved an administrative body's content-based refusal to issue a plate that it was

statutorily obligated to provide because the sponsor met all applicable eligibility criteria. Of course the court found viewpoint discrimination under such circumstances, just as this Court did on analogous facts in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). But nothing in the decision below is to the contrary.

The alleged split between that decision and a single other circuit court opinion purportedly implicated by petitioners' facial challenge is just as illusory. The Eighth Circuit decision on which petitioners rely, *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009), says nothing about the situation here, where again it is dispositive that the General Assembly authorizes each new plate without delegating any of that authority. And there are numerous obstacles to further review of petitioners' facial challenge, including the inapplicability of overbreadth analysis, petitioners' lack of standing to press a facial claim, and their failure to brief this issue adequately below.

Finally, petitioners seek to bolster their petition by anticipating that respondent will advance, as an independent ground to sustain the judgment below, that specialty plates are government speech to which First Amendment protections do not apply. But that argument would implicate no meaningful split in authority. And in any event this Court clarified the government-speech doctrine last Term in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009)

("*Summum*"), and it is far too early to claim irreconcilable confusion in the lower courts over the impact of that decision on the States' varied specialty-plate programs.

Ultimately, petitioners do not (and cannot) produce a single circuit court decision sustaining a First Amendment challenge to a specialty-plate process, like Illinois's, that requires the state legislature to enact a law authorizing each new plate, without a clear departure from past practices or other competent evidence of viewpoint discrimination. The Illinois legislature has not created any plate with an abortion-related message, and petitioners' proposed law is just one among dozens the General Assembly has declined to enact. The Seventh Circuit therefore rightly found nothing in the record to suggest viewpoint discrimination in the legislature's non-action here. In the end, when the dust settles on petitioners' several alleged conflicts and splits, they are asking this Court merely to review that factual record and rectify what they see (wrongly) as the appellate court's failure to consider evidence allegedly suggestive of the legislators' true motives in declining to pass a Choose Life plate bill. But even if well-founded (and it is not), such a request for error correction is not grounds for certiorari review.

STATEMENT

1. In Illinois, unlike most States, the legislature must pass a statute to authorize any new specialty license plate. Pet. App. 10a. By contrast, the majority of States delegate some or all of this authority to an official or other administrative entity.[1]

Illinois statutes authorizing new speciality plates are collected in Chapter 3, Article VI of the Illinois Motor Vehicle Code, 625 Ill. Comp. Stat. 5/3–600 *et seq.* (2008) ("Code"), including laws creating plates for war veterans and public officials, and others endorsing environmental protection, organ donation, and the prevention of violence and drug abuse. None of the specialty plates created by the Illinois legislature contains any message on the subject of abortion—pro-life, pro-choice, or otherwise. Pet. App. 3a, 25a.

2. Petitioners tried to garner legislative support for a Choose Life plate, but that plate, like dozens of others (including plates recognizing the Cancer Society, Community Colleges, Correctional Employee Memorial, Corvettes, Diabetes, Fallen Veterans, Illinois Coal Mining, Iraqi Freedom, K-12 Education, Lions Club,

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[1] Besides Illinois, the following States presently create specialty plates exclusively by specific legislative enactment: Alaska, Colorado, Florida, Kansas, Louisiana, Maine, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, Ohio, Rhode Island, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming.

NASCAR, Relay for Life, Road Worker Safety, Submarine Veterans, and Sudden Infant Death Syndrome) never inspired a new law authorizing its production. Pet. App. 1a-2a; see also Feb. 5, 2007 Motion, Ex. A; Nov. 30, 2007 Fed. R. App. P. 28(j) Letter 1-4.[2]

Petitioners then brought suit against respondent, Illinois Secretary of State Jesse White, who is responsible for administering the Code. Petitioners framed their case as one involving the unlawful delegation and exercise of power by respondent. The complaint thus began with the premise that the Code authorized him—not the General Assembly—to create new specialty plates, and that he had arbitrarily delegated this authority back to the General Assembly. Am. Comp. ¶¶ 3-4, 20-21, 23, 35, 43. Petitioners alleged that the failure to issue the Choose Life plate was the product of unlawful viewpoint discrimination, and they sought an injunction requiring respondent to issue their plate. Pet. App. 6a-7a. Their theory that Illinois law authorized respondent to issue speciality plates also took the form of a facial challenge, in which they claimed that the Code lacked sufficient standards cabining respondent's exercise of that authority. *Id.* at 7a; see also Oct. 4, 2005 Pet. Mem. 14-15. As relief on that claim, petitioners sought to enjoin Illinois's specialty-plate program in its entirety unless the State

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[2] Record materials outside the Petitioners' Appendix are identified by the filing date in the court's docket.

adopted viewpoint- and content-neutral criteria to govern respondent's actions. Pet. App. 7a.

The parties filed cross-motions for summary judgment. Respondent argued that if petitioners' claims did not fail at the threshold because specialty plates represent government speech rather than private expression, then they failed on the alternative ground that "the State does not engage in viewpoint discrimination by not approving the 'Choose Life' plate" but instead "simply remains neutral, taking no position on a politically-charged topic." Dec. 7, 2005 Resp. Mem. 2. Elaborating on the latter point, and contrary to misstatements in the petition (at pp. 7, 17-18 & n.11), respondent argued specifically that it is "legitimate" for the State "to avoid having its license plates be the place for the controversial competition of 'pro-life' and 'pro-choice' messages." Oct. 4, 2005 Resp. Mem. 10. Critically, respondent also made clear that he had no independent authority to permit new speciality plates—that he performed certain ministerial tasks, but only the General Assembly could authorize a new plate by statute. Dec. 7, 2005 Resp. Mem. 3-4.

The district court denied respondent's motion, granted petitioners', and ordered respondent to issue a Choose Life plate if petitioners met the Code's "numerical and design requirements for issuance of a specialty plate." Pet. App. 51a. The court adopted petitioners' view that the Code authorized respondent to issue a new specialty plate without a statute

specifically creating that plate, and concluded that the State had rejected the Choose Life plate proposal based on a desire to "suppress" petitioners' pro-life viewpoint. *Id.* at 36a, 50a.

3. Respondent appealed, and while the case was pending before the Seventh Circuit, the General Assembly amended the Code to clarify that—contrary to the district court's interpretation of Illinois law—new speciality plates are available *only* by specific legislative act. Pet. App. 10a-11a (citing Ill. Public Act 95-0359). In supplemental briefing, petitioners urged the Seventh Circuit to decide the appeal under pre-amendment Illinois law, Supp. Br. of Appellees 1-3, consistent with the manner in which they framed the case in their complaint.

4. The Seventh Circuit reversed. Without the benefit of this Court's later decision in *Summum*, the court applied the four-factor test for distinguishing between government and private speech used by the Fourth Circuit in *Sons of Confederate Veterans, Inc. v. Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV*"), and concluded that there were "enough elements of private speech" in Illinois's specialty-plate program to trigger First Amendment protections. Pet. App. 21a-22a. The nature of those protections turns on the type of "forum" that speciality plates represent, however, and on this score the court determined (in line with other courts of appeals) that the plates are a nonpublic forum, meaning

they are reviewed "for viewpoint neutrality and reasonableness." Pet. App. 24a. As the court explained, the "primary purpose" of license plates is "to identify the vehicle, not to facilitate the free exchange of ideas," and "Illinois hasn't opened this particular property for general public discourse and debate." *Id.* at 23a.

The court upheld the legislative decision not to pass a law authorizing the Choose Life plate as viewpoint-neutral and reasonable. It was viewpoint-neutral because it was "undisputed" that Illinois "has authorized neither a pro-life plate nor a pro-choice plate" and thus "has excluded the *entire subject* of abortion from its specialty-plate program." *Id.* at 3a (emphasis in original). The court contrasted this case with *SCV* and *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) ("*Rose*"), where States manifested viewpoint discrimination by singling out the Confederate Flag alone for exclusion from speciality plates, and by authorizing a Choose Life specialty plate while simultaneously rejecting a "pro-choice" plate, Pet. App. 25a.

Moreover, the court had "no trouble" concluding that the General Assembly's exclusion of all speech on the subject of abortion was reasonable. *Id.* at 27a. "License plates are * * * owned and issued by the State, and, as respondent had argued consistently, "specialty license plates in particular cannot come into being without legislative and gubernatorial authorization." *Id.* at 27a-28a. Thus, "[a]lthough the messages on

specialty license plates are not government speech, they *are* reasonably viewed as having the State's stamp of approval," and therefore "it is reasonable for the State to maintain a position of neutrality on the subject of abortion." *Id.* at 27a, 28a (emphasis in original).

Also, in a footnote, the Seventh Circuit rejected petitioners' facial challenge. The court held that the amendment clarifying that express legislative authorization is required for issuance of any specialty plate is controlling, and it rejected petitioners' fallback argument that their facial challenge was sound even if the General Assembly, not respondent, has exclusive responsibility for creating new specialty plates. *Id.* at 10a-11a n.4. As the court explained, "[i]t is axiomatic that one legislature cannot bind a future legislature," and, accordingly, petitioners' view that "the Illinois specialty-plate program is facially unconstitutional because it lacks any articulated standards governing * * * the state legislature's discretion to authorize new plates" has "no merit." *Ibid.* Thus, "[t]he General Assembly is entitled to authorize specialty plates one at a time," and "[i]t is not required to—and cannot—adopt 'standards' to control its legislative discretion." *Ibid.*

REASONS FOR DENYING THE PETITION

Petitioners' suggested reasons for granting the petition fail. First, petitioners rely chiefly on an alleged 1:1 split between the decision below and *Stanton*, but this shallow split is manufactured, for *Stanton* is perfectly compatible with the Seventh Circuit's holding that there was no viewpoint discrimination on these facts. Second, petitioners advance a claim—belatedly raised and summarily rejected in a footnote below—that Illinois's practice of creating specialty plates via individual statutes is facially invalid, and petitioners again allege a 1:1 split, this time with the Eighth Circuit's decision in *Roach*. But once again, petitioner's purported split is wholly illusory, as *Roach* does not even address, much less reject, the settled constitutional rule on which the Seventh Circuit relied. Finally, petitioners must establish that the messages on Illinois specialty plates are private rather than government speech, and this threshold requirement does not present an issue worthy of certiorari review. Accordingly, the petition should be denied.

I. There Is No Circuit Split Over What It Means For A Law To Be "Viewpoint Neutral."

The Seventh Circuit properly rejected petitioners' as-applied challenge, and that decision implicates no split in appellate authority. Petitioners repeatedly characterize their failure to obtain a law authorizing a Choose Life plate as a "selective" denial, Pet. i, 1, 11, 12, 13, 15, but what they call "selective" in this case has no

analogue in any of the purportedly conflicting authority on which they rely. The Seventh Circuit readily distinguished these cases of patent viewpoint discrimination on their facts, the only exception being an alternative holding in a single Ninth Circuit decision, and even that is easily reconciled with the opinion below. Far from evidencing a split over legal doctrine, courts merely are applying the same principles to very different facts. In each of petitioners' cases, courts inferred viewpoint discrimination from obvious differences in treatment or from the fact that a requested plate was denied after satisfying preset criteria for its issuance. Neither basis for finding viewpoint discrimination exists here.

1. Petitioners rest their petition largely on a manufactured split between the decision below and the Ninth Circuit's decision in *Stanton* over whether not issuing a Choose Life plate betrays viewpoint discrimination. Pet. 12-18, 20. To be sure, the opinion below suggests some "disagreement" between it and *Stanton*, Pet. App. 25a, a reference on which the petition relies heavily, Pet. 12-14. But petitioners overstate this alleged "conflict" dramatically.

First, the passage from *Stanton* with which the Seventh Circuit purported to "disagree[]" was unnecessary to the Ninth Circuit's decision. To survive a First Amendment challenge, the decision denying the plate in *Stanton* had to be both viewpoint-neutral and reasonable, and the court separately held that

defendants "acted unreasonably" in denying the plate where plaintiffs admittedly met Arizona's preset, substantive requirements for speciality plates. 515 F.3d at 972-973.

Second, and more critically, the instant case and *Stanton* are worlds apart factually, in a manner that bears directly on the presence vel non of viewpoint discrimination. The key difference between these two cases is the distinction between declining to open a forum to certain subjects and failing to respect the forum's boundaries after they are established. Thus, the decision below and *Stanton* are both faithful to the Court's teaching that "[o]nce it has opened a limited forum, * * * the State must respect the lawful boundaries it has itself set." *Rosenberger*, 515 U.S. at 829; see also *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 189 (2007); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-112 (2001).[3] Both recognize that if the speech of a party seeking access to a nonpublic forum is on a topic the government has included in the forum, denying access to that speech based on its message necessarily constitutes viewpoint discrimination.

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[3] Courts have sometimes used the term "limited public forum" to describe what *Davenport*, 551 U.S. at 189, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677 (1998), and *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985), referred to as a "nonpublic forum." See *Rosenberger*, 515 U.S. at 829. Respondent adopts the latter expression.

This principle compelled a finding of viewpoint discrimination in *Rosenberger*. After offering funding to various student groups for education-related speech, and thereby opening a nonpublic forum for student journalistic endeavors, the University of Virginia could not lawfully exclude a student magazine addressing topics included in that forum from a religious viewpoint. See 515 U.S. at 824, 828-837. Because "the subjects discussed were otherwise within the approved category of publications," it was clear that "[t]he prohibited perspective, not the general subject matter, resulted in the refusal to [provide funding]" and established unlawful viewpoint discrimination. *Id.* at 831. That is exactly what occurred in *Stanton*, and it bears no resemblance to the Illinois General Assembly's decision here not to enact a new law authorizing plates on a topic never before made the subject of an Illinois plate. That distinction, and not any conflict over applicable law, explains the different outcomes in the two cases.

Stanton addressed a challenge to the refusal by the Arizona License Plate Commission to issue a Choose Life specialty plate sought by Arizona Life Coalition. The governing Arizona statute required the Commission to issue such plates at the request of a not-for-profit organization if it satisfied three criteria, including that "'[t]he primary activity or interest of the organization serves the community [or] contributes to the welfare of others,'" and that "'[t]he purpose of the organization does not promote a specific religion, faith, or antireligious belief.'" 515 F.3d at 961 (quoting statute).

"The Commission [did] not dispute that Life Coalition * * * met each of the statutory requirements," *id.* at 973, but nonetheless it refused to issue the plate, *id.* at 962. Although the Commission gave no formal reason for its refusal, *ibid.*, during the application process members indicated that it was related to the message on Life Coalition's plate. Members "raised concerns over whether the general public would believe Arizona had endorsed the message of the 'Choose Life' license plate, [and] whether groups with differing viewpoints would file applications." *Id.* at 961.

The Ninth Circuit held that the Commission's refusal to issue the specialty plate not only "ignored its statutory mandate," but also constituted impermissible viewpoint discrimination because "Arizona has defined the outer limits of its speciality license plate program, and Life Coalition fits within those statutory boundaries." *Id.* at 973. Addressing the Commission's contention that it had not issued a specialty plate "to a group with a viewpoint in opposition to Life Coalition's and[,] therefore, neither side of the 'Choose Life' issue is represented by a special organization plate," *id.* at 971 (internal quotation marks and brackets omitted), the Ninth Circuit correctly determined that *Rosenberger* had "rejected a similar argument" when it held that denying access to "'an entire class of viewpoints'" that are within a forum's scope "'is just as offensive to the First Amendment as exclusion of only one,'" *ibid.* (quoting *Rosenberger*, 515 U.S. at 831).

But unlike in *Rosenberger* and *Stanton*, Illinois did not pass a statute making specialty plates available to a broadly defined category of speakers and messages, only to bar access to a speaker who indisputably fell within that category. This material distinction disposes of petitioners' alleged split. Unlike the Commission in *Stanton* or the university administrators in *Rosenberger*, who dispensed plates or funds according to preset substantive standards defining the respective speech forum, Illinois is creating its specialty-plate program through a series of individual statutes (to which no one is entitled, any more than parties are entitled to passage of any law), encompassing a limited number of subjects, not including the subject —abortion—on which petitioners wish to speak. The General Assembly's nonpassage of a bill authorizing a Choose Life specialty plate therefore cannot be equated with the Arizona Commission's refusal to issue a Choose Life plate under the Arizona program, or the university's refusal to fund plaintiffs' publication in *Rosenberger*.

As petitioners note, Pet. 12-14, the Seventh Circuit did reference the similarity between the Arizona Commission's belatedly expressed desire to avoid any speech on the subject of abortion, and respondent's argument that the General Assembly reasonably could have decided not to include any abortion-related messages in Illinois's specialty-plate program, Pet. App. 25a-27a. But given the two States' fundamentally different mechanisms for authorizing specialty plates,

that similarity is at best skin deep. It does not, as the Seventh Circuit mistakenly suggested, reflect a true disagreement over the meaning of *Rosenberger*. Having affirmatively opened its specialty-plate program by statute to speech on the topic of abortion, Arizona could not, consistent with *Rosenberger*, exclude one (or several) viewpoints on that topic. In short, both *Stanton* and the decision below are entirely consistent with one another and with *Rosenberger*.

2. Nor is there any conflict between the Seventh Circuit's finding of no viewpoint discrimination and two decisions of the Fourth Circuit, both of which the opinion below readily distinguished. In *Rose*, the South Carolina legislature authorized a Choose Life plate, rejecting arguments that the law should also authorize a plate allowing vehicle owners "to express the pro-choice view." 361 F.3d at 788-789 (internal quotation marks and brackets omitted). The Fourth Circuit's determination that this was impermissible viewpoint discrimination, see *id.* at 799 ("South Carolina has engaged in viewpoint discrimination by allowing only the Choose Life plate"), fully accords with the Seventh Circuit's conclusion that Illinois did not favor one abortion-related viewpoint over another, but instead excluded "the entire subject of abortion" from Illinois specialty plates, Pet. App. 25a.

The Fourth Circuit's earlier decision in *SCV*, which the Seventh Circuit likewise distinguished, also is perfectly consistent with the decision below. In that

case, the Virginia legislature had passed bills authorizing more than 100 specialty plates. See 288 F.3d at 614. Pursuant to state-issued guidelines, successful plate applicants were informed they could "'use [their] organization's logo or create a logo to be placed on the plate,'" and a letter from the Department of Motor Vehicles therefore asked these applicants to submit "'electronic media art of the logo and legend for the plate.'" *Ibid.* (quoting State's guidelines and letter, respectively). The lone exception to this memorialized practice was the law challenged in *SCV*, which authorized a specialty plate for the Sons of Confederate Veterans but affirmatively prohibited their plate alone from bearing any "logo or emblem," and thereby prevented members from obtaining "special plates bearing the symbol of their organization, which includes the Confederate flag." *Id.* at 613.

Finding this unique, logo-prohibiting law to constitute viewpoint discrimination, the Fourth Circuit emphasized "[t]he nature of the restricted speech, the lack of a generally applicable content-based restriction, the breadth of the special plate program in Virginia, and the lack of any restrictions in statutes authorizing special plates other than the SCV's." *Id.* at 626 (footnote omitted). That holding is consistent with the Seventh Circuit's decision here. As the court below observed, "Virginia was not imposing a 'no flags' rule"; rather, it singled out "a specific symbol commonly understood to represent a particular viewpoint." Pet. App. 24a.

3. Without a circuit split, petitioners challenge the decision below for its treatment of the factual record, including, in particular, claimed "evidence" that the Seventh Circuit did not see fit to mention. Specifically, they claim that the Seventh Circuit overlooked respondent's supposedly inconsistent justifications for the absence of a Choose Life plate from Illinois's program, Pet. 5, 6 & nn.4-5, 7, 17, 18 & n.11, 23, and purported evidence of actual viewpoint discrimination by the Illinois General Assembly, including an affidavit submitted by petitioner Dan Proft, *id.* at 4. But even if accurate, this amounts to a request for mere error correction, and these contentions are unfounded in any event. Respondent consistently maintained that the General Assembly's desire to stay neutral by avoiding the controversial subject of abortion, not hostility to petitioners' specific viewpoint, was a legitimate reason not to authorize the Choose Life plates. See *supra* p. 6. And critically, petitioners are simply wrong to suggest that the Illinois legislature has passed every other bill proposing a new specialty plate. Pet. 6 n.4, 16-17; see *supra* pp. 4-5.[4] As for the Proft "opinion" about certain

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[4] Even though respondent bore no burden to disprove viewpoint discrimination, and thus to show that other specialty-plate bills also died in the legislature, the record before the district court disclosed a number of bills (including bills that would have created specialty plates for K-12 Education, Submarine Veterans, Road Worker Safety, Relay for Life, NASCAR, and the Cancer Society) that recently had met that fate. Feb. 5, 2007 Motion, Ex. A. Then, when petitioners' counsel represented at oral argument on appeal that the

legislators' subjective motives for not passing a Choose Life plate bill, for multiple reasons the Seventh Circuit and the district court were on solid ground in disregarding it.[5] At bottom, then, the alleged factual basis for petitioners' viewpoint discrimination claim rests on a false choice between official endorsement and suppression of private speech, with no room for neutrality that avoids all speech on a subject.

4. Petitioners suggest in passing that Illinois's specialty-plate program is properly characterized as a "designated public forum," subjecting even content-based regulation to strict scrutiny. Pet. 18, 19 & n.12, 20. But no circuit court has ever held that a specialty-plate program is a designated public forum—even when the program, unlike Illinois's, is expressly open by

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General Assembly "approved all of th[e] specialty plates" requested except Choose Life, respondent clarified, based on judicially noticeable facts, that the General Assembly also failed to pass many other specialty-plate bills introduced (including ones pertaining to Iraqi Freedom, Community Colleges, Fallen Veterans, Corvettes, Sudden Infant Death Syndrome, and Diabetes). Nov. 30, 2007 Fed. R. App. P. 28(j) Letter 1-4.

[5] Among other things, Proft's "opinion" purporting to reveal the subjective, internal motivations of a few individual legislators and extrapolating that to the entire General Assembly was inadmissible under F.R.E. 702. And petitioners were further foreclosed from relying on it due to their failure to disclose it in accordance with Fed. R. Civ. P. 26(a)(2) and to identify it in their local Rule 56.1(a) Statement, see *Bordelon v. Chicago Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000).

statute to a broad category of defined subjects. See *Roach*, 560 F.3d at 868 n.4; *Stanton*, 515 F.3d at 968-971; *Rose*, 361 F.3d at 796-798; *SCV*, 288 F.3d at 623. And petitioners' speculation about how the Ninth Circuit "likely would" characterize Illinois's specialty-plate program, which they rightly concede is different from the Arizona scheme in *Stanton*, Pet. 20, is no basis for this Court's review.

5. Finally, petitioners claim that even if Illinois's specialty-plate program were a nonpublic forum, it is unreasonable, as a matter of law, for Illinois to exclude "controversial" or politically sensitive topics from the forum. Pet. 24-25. Again, no circuit court has adopted petitioners' view, and the Seventh Circuit's ruling is consistent with numerous holdings by this and other courts. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 809 (1985); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998) (White, *J.*).[6] If, as *Cornelius* holds, see 473

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[6] In the same vein, petitioners invoke the issuance of a "special event" plate to commemorate the inauguration of President Obama as a "reason to be skeptical" of the position that Illinois wishes to avoid abortion-related specialty plates because they are "too politically divisive or controversial." Pet. 25 n.14. But under Illinois law *special event* plates—which respondent has discretion to issue for qualifying occasions and may be displayed for 60 days, with the owner's regular license plates also on the vehicle, see Dec. 7, 2005 Resp. Mem. 5-6; 625 Ill. Comp. Stat. 5/3-808(f) (2008)—are very different from *specialty plates*, which are the exclusive focus of the claims here.

U.S. at 809, the controversial nature of a subject makes it reasonable to exclude that subject entirely from a nonpublic forum, then that same controversial nature cannot also make it *un*reasonable to exclude from that forum all viewpoints on that subject.

Petitioners base their argument chiefly on the false premise that Illinois specialty plates convey no state approval or endorsement of the messages on them and, therefore, that "[b]ecause the purposes of specialty plates are to raise revenue for the state and sponsoring organizations and * * * permit private expression," Illinois's decision to exclude the subject of abortion from its specialty plates cannot serve the forum's purposes. Pet. 24-25. Thus, in petitioners' view, once a State establishes a specialty-plate program, it may not decline to issue a requested plate, no matter the message, so long as it will produce revenue. This approach is nonsensical and, if adopted, would encourage States to do away with specialty plates entirely.

Moreover, contrary to petitioners' suggestion, Pet. 25 & n.15, the Eighth Circuit has not decided otherwise. *Roach* held merely that the messages communicated on Missouri specialty plates are sufficiently private to preclude their characterization as government speech. See 560 F.3d at 867-868. And to the extent that *Roach* held that Missouri's process for creating new plates did not establish official state approval for every plate's message, that conclusion is inapplicable to Illinois's fundamentally different mechanism of approving each

plate through individual legislative enactment. As for *Lewis v. Wilson*, 253 F.3d 1077 (8th Cir. 2001), the court there merely concluded that Missouri's program for vanity plates, whose individualized messages are crafted entirely by vehicle owners, did not provide its government administrators with sufficiently precise standards to refuse messages that are "obscene or profane." *Id.* at 1078-1081. Thus, neither decision conflicts with the Seventh Circuit's uncontroversial conclusion that, even if the messages on specialty plates include at least some elements of private speech, such messages may be "viewed as having the State's stamp of approval," making it reasonable for Illinois to exclude politically-charged subjects from these plates. Pet. App. 27a.

II. Petitioners' Facial Challenge Implicates No Circuit Split And Is Not A Ground For Further Review.

The Seventh Circuit's passing rejection of petitioners' facial challenge provides no basis for further review. Below, petitioners insisted that it was respondent, and not the General Assembly, who authorized specialty plates. Br. of Appellees 2-4, 13, 27-32, 34, 42-43. On appeal, petitioners argued for the first time, and then only briefly, that the Illinois system was facially invalid even if (as respondent correctly maintained) speciality plates require individual authorization from the legislature. *Id.* at 42-44. Indeed, even in their supplemental brief, filed with the Seventh Circuit after the General Assembly amended Illinois law

to make clear that only it can authorize new plates, petitioners devoted the bulk of their argument to the position they now abandon—that the court should decide this case under Illinois law as it stood before the amendment, which in their view empowered respondent to issue speciality plates. Supp. Br. of Appellees 1-2. They devoted only a paragraph to the claim that Illinois's process was invalid after the amendment. *Id.* at 3. And neither of petitioners' briefs below even cited *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), the decision they now claim is dispositive. Nor did petitioners contest the principle that, in this context, the Illinois General Assembly cannot bind itself to standards controlling its future decisions on creating specialty plates. Br. of Appellees 44.[7] Without sufficient development below, including the failure even to cite the case petitioners now criticize the Seventh Circuit for ignoring, petitioners' facial challenge to current Illinois law is not properly before this Court. See *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999) (*per curiam*) (declining to consider claims not "sufficiently developed below"); *Wisconsin v. Mitchell*, 508 U.S. 476, 481 n.2 (1993) (same).

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[7] The petition also advances two other arguments that petitioners never made below and thus forfeited: a claim that the General Assembly's decisions to create new specialty plates are not an exercise in "legislative authority," Pet. 32, and the contention that even if federal law recognizes a state legislature's inability to limit its own power, that could not "trump the First Amendment (or the power of the federal courts to remedy a constitutional violation)," *id.* at 32-33.

Even if it were, it is not an issue worthy of further review. Contrary to petitioners' claim, Pet. 27-30, the basis for the Seventh Circuit's ruling—that "one legislature cannot bind a future legislature," Pet. App. 10a n.4—is perfectly consistent with both *Roach* and *Shuttlesworth*. And petitioners gloss over threshold issues that are independently fatal to their facial challenge and therefore preclude review of the *Roach*/*Shuttlesworth* issue they now raise—namely whether First Amendment overbreadth analysis even applies in these circumstances and, if so, whether petitioners have standing to raise it.

1. As the Seventh Circuit recognized, the Constitution prohibits one legislature from limiting a future legislature's power. See, *e.g.*, *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (federal law); *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, *C.J.*) (same); see also *Mix v. Ill. Cent. R.R. Co.*, 6 N.E. 42, 44 (Ill. 1886) (Illinois law). That reality is alone fatal to petitioners' facial challenge, for the First Amendment does not authorize enjoining Illinois's specialty-plate program on the ground that the legislature has not enacted a law it has no power to enact—here, a law that would place substantive limits on future specialty-plate approvals.[8]

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[8] Petitioners deny that their theory requires the General Assembly to pass a law that is "binding" on itself. Pet. 32. But if that were correct, it would negate the key premise of their facial claim, which depends on the availability and necessity of standards controlling future speech-regulating decisions.

Petitioners seek to depict this as the subject of another circuit spit, but no such conflict exists. Their quarrel with the footnote in the decision below—which they characterize as embracing a "'legislative body'" exception to First Amendment overbreadth analysis, Pet. 28, but is more properly viewed as rejecting a First Amendment overbreadth exception to the constitutional principle that a legislature cannot limit its future lawmaking authority—is not supported by any decision of this Court or any federal court of appeals. The two cases on which petitioners rely, *Shuttlesworth* and *Roach*, are in no way inconsistent with the opinion below.

a. *Shuttlesworth* voided convictions under an ordinance imposing a prior restraint on expression in a traditional public forum without "narrow, objective, and definite standards" to govern licensing decisions. 394 U.S. at 150-153. The ordinance granted authority to issue parade licenses to the Birmingham City Commission, and petitioners cite a phrase in the Alabama Appellate Court's decision (not the decision reviewed by this Court) referring to that Commission as "'the City's legislative body.'" Pet. 28-29. But it is well settled that this Court's precedent resides in the questions it actually decides, not in "inferences from

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Indeed, petitioners' facial claim, if accepted, would turn the nondelegation doctrine on its head by requiring a legislature always to delegate its authority to decide what speech will be allowed in a nonpublic forum.

opinions which did not address the question." *Texas v. Cobb*, 532 U.S. 162, 169 (2001). And in any event this Court did not characterize the Commission as petitioners suggest; instead, it framed the question before it as one involving "discretion" in the hands of "administrative" or "licensing officials." 394 U.S. at 153 (internal quotation marks omitted).[9] It comes as no surprise, therefore, that this Court has described *Shuttlesworth* as applying where expressive conduct "has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59 n.17 (1976) (citing *Shuttlesworth*, 395 U.S. 147). That rule does not conflict with the Seventh Circuit's decision here, where the recent amendment makes clear that the General

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[9] The Court was correct to depict the Commission as acting in a non-legislative capacity in this context. The Commission likely undertook both legislative and administrative duties, and issuing licenses (without any suggestion that such issuance required new legislation, as it does in Illinois) would be an administrative function. See *City of Mobile v. Bolden*, 446 U.S. 55, 59 (1980) ("City Commission" of Mobile, Alabama, "exercise[s] all legislative, executive and administrative power in the municipality"). Consistent with that understanding, an offer of proof in a case arising out of the same events showed "that the [Birmingham] City Commission had never passed on permit applications in the past, but had delegated the task to inferior officials." *Shuttlesworth*, 394 U.S. at 163 n.5 (Harlan, J., concurring).

Assembly has not delegated its authority to respondent or any other official.

b. For the same reason, there is no conflict between the decision below and *Roach*. The statute in that case required the Missouri Department of Revenue to grant all specialty-plate applications by private organizations meeting certain content-neutral criteria, provided that applications received "unanimous" approval from the Joint Committee on Transportation Oversight, whose voting members were state legislators. 560 F.3d at 862, 870. Two committee members, who described themselves as "pro-choice," opposed plaintiffs' application for a Choose Life plate; the Department of Revenue denied it; and plaintiffs challenged the denial, arguing that the "statutory scheme was unconstitutional because it gave Missouri officials unbridled discretion to restrict private speech." *Id.* at 863. Sustaining this claim, the Eighth Circuit held that the statute vesting the Committee with veto power over specialty-plate applications was facially unconstitutional because it contained no standards preventing the Committee from denying applications based on viewpoint. See *id.* at 869-870.

To manufacture a split between this case and *Roach*, petitioners mischaracterize the latter as a decision about standardless discretion in the hands of a "'legislative body.'" Pet. 28. *Roach* involved no such thing. The Committee whose discretion plaintiffs challenged in that case was not "legislative"; it was

administrative, notwithstanding that it was made up of legislators. Indeed, Missouri law is clear that the state legislature's role begins and ends with passing statutes, and that any entity with control over implementation of a statute—even one that happens to be composed of legislators—is an administrative agency that must be housed in the executive branch of government. See *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 133-134 (Mo. 1997); *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231, 233 (Mo. Ct. App. 1997).

The Eighth Circuit recognized this distinction at the outset, when it differentiated between the two methods for seeking a specialty plate in Missouri: the legislative route, requiring the state legislature to "pass a bill that creates a specialty plate," and the administrative process that plaintiffs challenged. 560 F.3d at 862. Plaintiffs carefully observed this distinction as well. They acknowledged that the joint committee members, when exercising veto power over specialty plates meeting the statutory eligibility criteria, "were not acting in their legislative capacities" and that "[t]heir actions were only administrative." Pl. Mem. 9 n.9, *Choose Life v. Vincent*, No. 06-0443-CV-W-SOW (W.D. Mo. Nov. 5, 2007). And on appeal they repeatedly emphasized the constitutional significance of the fact that they were *not* challenging the legislature's own approval process. See Br. of Appellees, *Roach v. Davis*, No. 08-1429 (8th Cir. July 15, 2008), 2008 WL 2861766, at *12, 14 (noting that, under challenged provision,

"[t]he messages never go before the legislature for [a] vote," "[t]he Missouri legislature never votes to *approve* the message after a private organization submits its application," and "[t]he private message never goes before the Missouri governor for signature") (emphasis in original).

Petitioners' error is to mistake *Roach*'s rejection of defendants' legislative immunity defense for a conclusion that the committee was somehow "legislative" in character. Defendant committee members had claimed they were "immune from suit" because they were "legislators, not administrators or hired state employees." 560 F.3d at 870. The court rejected this theory on the ground that "immunity * * * is a *personal* defense that is available only when officials are sued in their individual capacities," and thus legislative immunity was unavailable because plaintiffs "filed suit against the members of the Joint Committee in their official capacities." *Ibid.* (citations and internal quotation marks omitted) (emphasis in original). Accordingly, the Eighth Circuit simply held that prospective equitable relief of the type permitted under *Ex parte Young*, 209 U.S. 123 (1908), is available to prevent an administrative body's exercise of veto authority over access to a nonpublic forum to which the governing statute otherwise grants a right of access.

2. In any event, petitioners' facial challenge fails on an alternative ground, making this case a singularly poor vehicle to address the issues raised in the petition,

even if they otherwise were grounds for this Court's review. Specifically, as respondent argued below, see Br. of Appellant 44-45, First Amendment overbreadth analysis does not automatically apply to every speech-regulating action affecting a nonpublic forum. Overbreadth is "strong medicine" that is used "sparingly," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and petitioners, who rely on this Court's precedents involving prior restraints on speech in traditional public fora, do not provide any appellate authority for their critical assumption that overbreadth principles necessarily apply to all restrictions in a nonpublic forum, much less to a specialty-plate program, like Illinois's, where the legislature has not delegated any authority over the creation of new plates, but instead exercises that authority on its own by passing an individual law for every plate.[10]

Petitioners cannot prevail without overcoming this obstacle, yet there is no circuit split or other basis for addressing it on certiorari review. Indeed, respondent knows of only one instance in which this Court transplanted the First Amendment overbreadth doctrine to a challenge involving a nonpublic forum, but that decision is readily distinguished. *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus,*

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[10] *Roach* did not present that issue because, as explained above (at pp. 27-28), Missouri's specialty-plate program delegated to an administrative body unlimited discretion to veto any specialty-plate application meeting all of the enabling statute's eligibility criteria.

Inc., 482 U.S. 569 (1987), held that an absolute ban on *all* "'First Amendment activities'" in the Los Angeles airport's central terminal area, including "even talking and reading, or the wearing of campaign buttons or symbolic clothing," was facially unconstitutional because "even if [the airport] were a nonpublic forum * * * no conceivable governmental interest would justify such an absolute prohibition of speech." *Id.* at 575. That limited holding by no means supports applying overbreadth analysis here.

3. Finally, petitioners lack standing to advance their facial challenge, a second insurmountable obstacle to review by this Court. Even if Illinois had standards to prevent discrimination against viewpoints on the topics encompassed by its specialty-plate program, those topics do not include abortion. The presence of such standards therefore could not benefit petitioners. Unlike parties who might want Illinois to create a specialty plate with a message on a subject that is included in the State's program, petitioners cannot satisfy the "redressability" component of standing for their claim that the General Assembly must adopt such standards. See *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (finding lack of standing to bring facial challenge to local sign code because "a favorable decision [still] would not allow [plaintiff] to build its proposed signs"); see also *Midwest Media Prop., LLC v. Symmes Twp., Ohio*, 503 F.3d 456, 461-464 (6th Cir. 2007); see generally *Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2768-2769 (2008)

(Article III's core standing requirements, including a concrete injury fairly traceable to defendant's challenged behavior that is likely to be redressed by a favorable ruling, must be demonstrated "for each form of relief that is sought") (citations and internal quotation marks omitted).

III. Respondent's Alternate Theory That Illinois Specialty Plates Are Government Speech Provides An Additional Reason To Deny The Petition.

Respondent has consistently maintained that the messages on specialty plates are government rather than private speech and thus are exempt from scrutiny under the Free Speech Clause. Pet. App. 7a. Even petitioners acknowledge that this argument provides an independent ground for affirming the judgment below. Pet. 20. Petitioners are wrong to suggest, however, that the government-speech issue somehow provides an additional reason for review. *Ibid.* The "conflict" petitioners describe is largely (if not entirely) the product of material factual differences in the procedures States use in authorizing new specialty plates. And this case is an especially poor vehicle for addressing the government-speech issue because Illinois is among the minority of States that approve plates exclusively by legislative act. Finally, this Court revisited the definition of government speech last Term in *Summum*, and more time is needed before proclaiming that lower courts are in hopeless disarray over its effect in this context.

1. Even without taking account of *Summum*'s impact, petitioners grossly exaggerate the extent of any pre-*Summum* disagreement over government-speech analysis in the context of specialty-plate programs, and thus any arguable justification for the Court to consider the government-speech issue in this case. Petitioners are wrong to say that the circuits are divided into two doctrinal camps, with the Fourth, Seventh, Eighth, and Ninth Circuits supposedly holding that specialty plates are never government speech, and the Sixth Circuit ruling that specialty plates are always government speech. Pet. 10-11, 20. This mischaracterization of the relevant decisions ignores the legal significance of different States' varied methods for creating specialty plates.

Central to petitioners' alleged split is the Sixth Circuit's decision in *ACLU of Tenn. v. Bredesen*, 548 U.S. 906 (2006) ("*Bredesen*"), the first specialty-plate decision after *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), which held that the Tennessee legislature's action creating a Choose Life specialty plate was government speech. See 441 F.3d at 380. Petitioners contrast *Bredesen* with the Ninth Circuit's decision in *Stanton* and the Eighth Circuit's in *Roach*, which held that Choose Life plates were private speech. But *Bredesen* involved a specialty-plate program that, like Illinois's, created new plates by the passage of individual laws, while *Roach* and *Stanton* addressed programs that were statutorily opened on an indiscriminate basis to broad categories of private

speech. The cases thus are materially distinguishable—the outcomes are different because the facts are different, not because the decisions announce different legal rules.

In *Bredesen*, the Choose Life message on specialty plates conveyed government speech because the legislature had created the plate through an individual law in which it "chose * * * and approved every word to be disseminated." 441 F.3d at 376. As the court explained, the plate's message was "government-crafted" by the Tennessee legislature itself, which had "spelled out in the statute that these plates would bear the words 'Choose Life.'" *Id.* at 375-376. Thus, as support for its conclusion that the speech was the State's own, the Sixth Circuit emphasized that the legislature was the source of the message.

The district court in *Roach* understood the important distinction between legislative and non-legislative approval schemes, distinguishing the administrative process challenged in that case from one in which "specific messages are created through legislative enactment." D. Ct. Order 11 n.9., *Choose Life v. Vincent*, No. 06-0443-CV-W-SOW (W.D. Mo. Jan. 23, 2008). Likewise, the *Roach* plaintiffs recognized this difference and emphasized throughout their appellate brief that they were challenging an administrative approval process in which plates lacked any legislative imprimatur. See Br. of Appellees, 2008 WL 2861766, at *12. The Eighth Circuit correspondingly recognized

that "the more control the government has over the content of the speech, the more likely it is to be government speech," *Roach*, 560 F.3d at 864, and it stressed facts specific to that case: that the Joint Committee's administrative authority to approve or deny a plate was "based solely on a general description of the plate provided by the sponsoring organization," and that, once approved, plates are "produce[d] * * * without further input from the Joint Committee or any other state actor," *id.* at 867. Under this approach, the sponsoring organization, and not the state legislature, "bear[s] the ultimate responsibility for the message." *Id.* at 868.

Similarly, *Stanton* emphasized that the administrative body exercised only "de minimis editorial control over the plate design and color," and that while it was charged with determining whether the sponsoring organization met the statutory requirements, those requirements "address[ed] who may speak, not what they may say." 515 F.3d at 966. Thus, again, the organization, not the legislature, "determined the substantive content of th[e] message." *Ibid.*

Nor does *Bredesen* present a current conflict with the Fourth Circuit's decisions in *SCV* and *Rose*. To be sure, those decisions involved challenges to legislatively created plates, but in holding that the plates were private speech the *SCV* court expressly found that the legislature did not "ordinarily assert 'editorial control'

over the content of the[ ] plates." 288 F.3d at 621; see also *Rose*, 361 F.3d at 793 (plate at issue in *SCV* "was sought and designed by the plate's private sponsor"). In addition, unlike *Bredesen*, both *SCV* and *Rose* were decided without the benefit of the Court's government-speech ruling in *Johanns*. Moreover, both relied on the four-factor test that neither *Johanns* nor *Summum* embraced, and that even *Rose* admitted produces an "indeterminate," 361 F.3d at 793—and therefore easily manipulable—result. Thus, they lack enduring vitality for purposes of ascertaining current doctrine, or contributing to a meaningful conflict, in this area.

2. The variety of ways in which different States create specialty plates also means that a decision on the government speech issue in this case would be relevant only in that minority of States where the legislature alone decides what specialty plates to create. See *supra* at 4 n.1. Thus, any decision by this Court on whether Illinois specialty plates are government speech would be of limited effect.

3. Finally, *Summum* dramatically affects the government-speech analysis for First Amendment claims involving a government-created forum. In holding that privately donated monuments in public parks were government speech, *Summum* made no mention of the four-factor test that petitioners vigorously advocated below, see Br. of Appellees 15, 18, 20, and that the Fourth, Seventh, Eighth, and Ninth Circuits approved, Pet. App. 14a-21a. Thus, until the

lower courts have had an opportunity to assess *Summum*'s effects on specialty-plate programs, it is premature for the Court to address any claim that depends, as petitioners' does, on a determination that the messages in a particular program are private rather than government speech.

Indeed, *Summum* likely will have a significant impact on the potentially dispositive government-speech question in many specialty-plate cases.[11] The Court held that monuments could convey government speech even if "donated in completed form by private entities," because the government had "exercis[ed] 'final approval authority'" over the monuments' selection and thereby "'effectively controlled' the messages" they sent. 129 S. Ct. at 1134 (quoting *Johanns*, 544 U.S. at 560-561). Moreover, because cities and other jurisdictions, in deciding whether to accept donated monuments, consider various "content-based factors," "[t]he

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[11] Petitioners inaccurately suggest that *Roach* negates this conclusion. Pet. 10. As noted above (at p. 27), however, the Missouri specialty-plate program in *Roach* was statutorily open to virtually all private organizations. That approach therefore embodied the polar opposite of the "selective receptivity" emphasized in *Summum*, 129 S. Ct. at 1133, and, likewise, of the method chosen by the General Assembly to authorize specialty plates in Illinois. Thus *Roach*—which was decided only a month after *Summum*, without supplemental briefing or argument, and, after a cursory discussion, simply concluded that *Summum* did not "require[] a different *outcome*" in that case, 560 F.3d at 868 n.3 (emphasis added)—does not minimize *Summum*'s impact on government-speech analysis in cases like this one.

monuments that are accepted * * * are meant to convey and have the effect of conveying a government message." *Ibid.* This analysis bears critically on the government-speech question in cases like this one, where the legislature not only retains "final approval authority" over specialty plates, but itself crafts, by individual legislation, the specific message on every state-issued plate.

This Court has long recognized the many advantages in permitting the lower courts to weigh in on new legal issues before addressing them (if necessary) on certiorari review. See, *e.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, *J.*, respecting denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court."). Such an exercise of restraint is especially appropriate in the present circumstances. As several of the Court's members have noted, the "category of government speech" is "relatively new." *Summum*, 129 S. Ct. at 1142 (Souter, *J.*, concurring in the judgment); accord *id.* at 1139 (Stevens, *J.*, joined by Ginsburg, *J.*, concurring) (describing government speech doctrine as "recently minted"). As a result, "it would do well for [the Court] to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored." *Id.* at 1141 (Souter, *J.*, concurring in the judgment). The latter observation is particularly apt here, for *Summum* will inevitably have significant

implications for challenges to government decisions regarding specialty plates, yet the lower courts have had almost no opportunity to consider them.

In short, even if this Court were inclined to review the questions petitioners present, this case is an unsuitable vehicle for doing so because lower courts have not yet had an adequate opportunity to address the effect of *Summum* on the government-speech issue in the context of specialty-plate programs, and petitioners would have to prevail on that issue before the Court could address the issues on which they do seek review.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted.

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CHOOSE LIFE ILLINOIS, INC., ET AL.,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONERS

In the petition, we showed that further review is needed to bring national uniformity to the patchwork of conflicting decisions – including several intercircuit conflicts acknowledged by the courts below – that have arisen from a decade of First Amendment litigation involving "Choose Life" and other specialty license plates. Pet. 8-20, 26-30. In an effort to persuade this Court to allow that legal disarray to persist, respondent seizes on a statutory amendment made by Illinois while this case was on appeal. But that amendment merely resolved an embedded *state-law issue*; it did not vitiate the circuit conflicts. Equally unavailing are the flurry of meritless waiver, vehicle, and other arguments respondent advances. For the reasons set forth in the petition and below – and in two *amicus* briefs respondent ignores – the petition should be granted.

I. The As-Applied First Amendment Issue Warrants Review

In the petition (at 12-13, 15-17), we showed that the Seventh Circuit placed itself in direct conflict with the Ninth and Fourth Circuits by holding that Illinois had not engaged in viewpoint discrimination when the state selectively rejected the "Choose Life" plate after approving many other plates, including some bearing controversial messages. We further demonstrated (Pet. 13-14) that the Seventh Circuit's decision rested largely on a disagreement with the Ninth Circuit about the meaning of *Rosenberger* v. *Rector & Visitors*, 515 U.S. 819 (1995), and *Rosenberger*'s demarcation of the line between viewpoint and content discrimination. We explained that the analytical approach used by the Fourth and Ninth Circuits in resolving identical as-applied challenges was dramatically different from the Seventh Circuit's approach. Pet. 16-18. And we

pointed out that further review would allow this Court to resolve conflicts and confusion in the lower courts over both (1) the nature of the specialty license plate forum, and (2) whether messages on specialty plates are private or government speech. Pet. 18-20.

Respondent repeatedly suggests that these conflicts are "manufactured" (Opp. 10, 11), but the Seventh Circuit *expressly acknowledged* that it was both creating a direct conflict with the Ninth Circuit *and* deepening an entrenched and widely acknowledged conflict with the Sixth Circuit on the private/government speech issue. Pet. App. 19a, 27a; see also *Amicus* Br. of Choose Life Int'l *et al.* ("CLI Br."), at 18 & n.5 (citing numerous commentators who have recognized these conflicts). It is respondent's efforts to deny these conflicts that turn out to be "manufactured."

1. Respondent relies heavily on a recent amendment to Illinois law. See Pet. App. 36a-38a; Pet. 3-4 & n.2. That change, however, in no way undermines petitioners' as-applied claim, which has always been that the selective refusal of Illinois to approve the "Choose Life" plate – including the General Assembly's failure to authorize it – constituted impermissible viewpoint discrimination. That selective refusal is no less viewpoint-based because the requirement of prior legislative approval is now written into a statute as opposed to set forth in an administrative policy statement. If anything, by removing the need to explore Illinois administrative law, the amendment *simplifies* this case and makes it a *cleaner* vehicle for deciding the important and recurring issues of First Amendment law presented.

Respondent is equally wrong (Opp. 11-16) that the statutory amendment renders the intercircuit conflicts illusory. In *Arizona Life Coalition, Inc.* v. *Stanton*, the Ninth Circuit squarely held that Arizona had engaged in impermissible viewpoint discrimination by selectively denying the "Choose Life" plate despite having approved a broad range of other specialty plates. 515 F.3d 956, 969-72 (2008). That is exactly what Illinois did here. And the Ninth Circuit rejected the state's argument – credited by the Seventh Circuit in this case – that there was no viewpoint discrimination because Arizona had excluded *both* sides of the controversial abortion debate from the specialty plate forum. *Id.* at 971-72. That holding turned on the Ninth Circuit's understanding of *Rosenberger* – an understanding the Seventh Circuit expressly rejected below – and not (as respondent now suggests) on whether prior legislative approval of new plates is required or whether *other* preconditions in the statute had been satisfied. See also *Amicus* Br. of Consistent Life *et al.* ("CL Br."), at 4-20 (discussing Seventh Circuit's departure from long historical tradition of protecting controversial speech).

Respondent also suggests (Opp. 11-12) that *Stanton*'s holding on viewpoint discrimination is *dicta* because the Ninth Circuit also concluded that Arizona's rejection of the "Choose Life" plate was unreasonable. But that argument overlooks the fact that the Ninth Circuit followed a defined sequence in conducting its First Amendment analysis, noting that "[t]he first step in assessing" Arizona Life Coalition's claim was to determine the "nature of the forum," then proceeding to decide whether Arizona's action was viewpoint or content discrimination, and finally addressing briefly whether rejection of the plate was reasonable. 515

F.3d at 968, 971-73. Not surprisingly, then, the Seventh Circuit treated *Stanton*'s viewpoint discrimination analysis as a clear holding and future Ninth Circuit panels no doubt will do the same. In any event, as previously explained (Pet. 18, 20, 24-25), *Stanton*'s reasonableness analysis also conflicts with the Seventh Circuit's reasonableness analysis in this case.

2. Respondent fares no better in attempting (Opp. 16-17) to deny the conflict with two decisions of the Fourth Circuit recognizing "fairly obvious instances of discrimination on account of viewpoint." Pet. App. 24a; see Pet. 15-16. As previously explained (Pet. 15), the Seventh Circuit's view that *Sons of Confederate Veterans* v. *Comm'r of the Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV*"), could be distinguished because there Virginia "was not imposing a 'no flags' rule" but rather was singling out "a specific symbol commonly understood to represent a particular viewpoint" simply overlooks the fact that *Virginia itself* sought to defend the logo proscription as viewpoint neutral on the ground that it reflected a ban on *all* uses of the Confederate flag on specialty plates. Pet. 15. (Here too, Illinois has claimed that it merely enforces a ban on any plate relating to the topics of abortion or "reproductive rights.") The Fourth Circuit rejected Virginia's submission, whereas the Seventh Circuit accepted Illinois's identical argument uncritically. Respondent offers no answer to this point, and there is none.[1]

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[1] Respondent claims that Illinois's rejection of the "Choose Life" plate was not "selective," pointing to other plates he claims "the record" shows were also rejected. Opp. 4-5, 18 n.4. But respondent neglects to mention that this "evidence" was submitted for the first time in support of his motion to alter or amend the judgment -- a

3. Respondent does not deny that the Fourth and Ninth Circuits' analytical approach to the issue of viewpoint discrimination is dramatically different from the Seventh Circuit's approach. See Pet. 16-18; see also CLI Br. 10-16 (discussing divergent treatment of suppression of "controversial" speech). Nor does he dispute that there is widespread confusion in the lower courts concerning both the nature of the forum created by specialty and vanity license plates and the proper method of analyzing the issue of reasonableness. See Pet. 18-20. Regardless whether there is an explicit circuit split on these subsidiary issues, they provide an additional reason why the petition should be granted.

4. Respondent spills much ink (Opp. 32-39) disputing that further review would permit this Court to resolve the circuit conflict over whether messages on specialty license plates are private or government

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motion the district court *denied* in a ruling respondent failed to challenge on appeal. In the summary judgment proceedings, petitioners had consistently maintained that the "Choose Life" application was the *only* specialty plate to be rejected on the merits, and respondent offered no argument or evidence to the contrary. The district court accordingly determined that "[t]here is no evidence that the General Assembly has exercised its discretion in denying a specialty plate bill." Pet. App. 44a.

In the Seventh Circuit, respondent submitted a Rule 28(j) letter after oral argument inviting the court to consider the untimely "evidence" the district court had rejected. Not surprisingly, the Seventh Circuit declined to do so and made no mention of the bills cited in the 28(j) letter. See *Bowman* v. *City of Franklin*, 980 F.2d 1104, 1107 n.1 (7th Cir. 1992) (Rule 28(j) allows only for identification of additional *authority*, not new *evidence*). In any event, respondent's "evidence" appears to be nothing more than a list of pending bills that *lapsed* when the General Assembly's session *ended*, which hardly detracts from our submission that the "Choose Life" plate is the *only* one that the evidence shows was rejected on substantive grounds. Pet. App. 66a.

speech. Although respondent does not deny that he would ask this Court to resolve that issue if review is granted, he takes issue with the extent of the conflict, reverting to the now-familiar tactic of suggesting that the divergent outcomes (although recognized as such by the courts of appeals, see, *e.g.*, Pet. App. 3a & n.1, 13a, 20a) can in fact be explained by different features of the specialty plate schemes at issue that the courts of appeals failed to appreciate. Plainly, the courts of appeals do not share respondent's assumption that Illinois's delegation of authority to the General Assembly is qualitatively different from schemes where that authority rests with either an administrative agency or an executive department. Indeed, the Seventh Circuit itself appears to have rejected that assumption, which respondent vigorously pressed below. See Pet. App. 19a (describing *Stanton* as "a case very much like our own"), 21a (characterizing Illinois's scheme as similar to that used in other states).

In any event, respondent is wrong in contending that the "distinction between legislative and non-legislative approval schemes" (Opp. 34) explains the conflicting results. As even respondent admits (Opp. 35-36), this explanation cannot account for the Fourth Circuit's decisions in *SCV* and *Planned Parenthood of S.C., Inc.* v. *Rose*, 361 F.3d 786 (4th Cir. 2004). Those cases, after all, just like *ACLU of Tenn.* v. *Bredesen*, 441 F.3d 370, 380 (6th Cir. 2006), "involved challenges to legislatively created plates." Opp. 35. Nor does respondent's distinction account for the Seventh Circuit's clear holding *in this case* that specialty-plate messages in Illinois are not government speech. Pet. App. 11a-22a. And respondent's attempt to minimize the continuing impact of the Fourth Circuit's pre-*Johanns* four-factor test on other courts (Opp. 36) is

unpersuasive given the Ninth Circuit's post-*Johanns* adoption of that test. *Stanton*, 515 F.3d at 964-65.

Respondent contends (Opp. 36-37) that review of the government/private speech issue is "premature" given *Pleasant Grove City* v. *Summum*, 129 S. Ct. 1125 (2009). But the Eighth Circuit explicitly considered *Summum*'s potential impact and concluded, correctly, that *Summum* involved a "much different issue" and thus does not alter the conclusion that specialty-plate messages are private rather than government speech. *Roach* v. *Stouffer*, 560 F.3d 860, 863-65 & 868 n.3 (8th Cir. 2009). At the very least, then, the split between the Sixth and Eighth Circuits will persist.[2]

Even if the circuit conflict could be reconciled by looking to how each state authorizes specialty plates (which it cannot), respondent has identified 18 states that, like Illinois, create specialty plates exclusively by specific legislative action (Opp. 4 n.1). Of those 18 states, nine are located in the seven circuits that have already considered this issue. See Pet. 10 & n.9.

In a final effort to muddy the waters, respondent claims (Opp. 18-19) that this case boils down to a disagreement about the factual record. That is false. It is respondent, not petitioners, who is seeking to

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[2] The Eighth Circuit's conclusion was surely correct. *Summum* did *not*, as respondent argues, "dramatically affect[] the government-speech analysis." Opp. 32, 36. Rather, this Court relied on the unique characteristics of permanent monuments placed on public property, the history of donated monuments in particular, and the limited capacity of public parks. See 129 S. Ct. at 1132-38. Nor would *Summum* apply here, any more than in *Roach*. Missouri's program was "statutorily open" in the same sense as Illinois's: Both could be closed off to a particular plate by state legislators.

remake the record in this case. See note 1, *supra*.[3] Moreover, respondent's shifting rationales for denying the "Choose Life" plate (Pet. 16-18 & n.11) – including his invention on appeal of a "policy" of excluding the "entire subject of abortion" (or "reproductive rights") – would not have been tolerated in other circuits (such as the Ninth and Fourth) that do not follow the Seventh Circuit's infinitely deferential approach. Pet. 16-17; CLI Br. 19-22.

II. The Seventh Circuit's Rejection Of Petitioners' Facial Challenge Also Warrants Review

We showed in the petition (at 26-33) that the second question presented independently warrants review because the Seventh Circuit strayed from both this Court's decision in *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147 (1969), and the Eighth Circuit's decision in *Roach*, in recognizing a novel and troubling "legislative body" exception to the longstanding principle that standardless licensing authority violates the First Amendment. See also CLI

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[3] Respondent's contention that the Proft declaration was inadmissible (Opp. 18-19 & n.5) rests on several erroneous assumptions. First, the declaration *was* identified in (and was incorporated into and submitted with) petitioners' Local Rule 56.1 Statement (see Doc. 31 at ¶ 43; Doc. 33). As for the alleged violations of Fed. R. Civ. P. 26(a)(2) and F.R.E. 702, the declaration contained a factual account of Proft's conversation with, and impression of hostility from, the President of the Illinois Senate, as well as the highly unusual treatment the bill received from a House legislative committee. Pet. App. 66a-67a. It was not offered as expert testimony. In any event, respondent's objections to the declaration were raised for the first time in the motion to alter or amend the judgment and thus are waived. Compare Doc. 53, at 8 n.3, with Doc. 35 at ¶ 43.

Br. 19-22 & n.6; CL Br. 20-25. Respondent's arguments against review are all unpersuasive.

First, respondent pretends (Opp. 22) that petitioners never adequately raised the facial challenge in the district court. That is demonstrably untrue. The complaint contained a separate facial challenge that expressly targeted the absence of standards governing *both* the Secretary's *and* the General Assembly's approval decisions. See Amended Cplt. (Doc. 14), at ¶¶ 3, 23, 42-47. Petitioners clearly pressed the same argument on appeal, see Pet. C.A. Br. 42-43, as the Seventh Circuit itself acknowledged, see Pet. App. 10a n.4. Moreover, petitioners *did* bring the conflict with *Shuttlesworth* to the Seventh Circuit's attention in a rehearing petition, which the panel denied. Reh'g Pet. 11-15. Thus, the Seventh Circuit had every opportunity to consider these arguments, which were fully developed below.[4] In any event, so long as an issue was *either raised or decided* in the court of appeals, this Court has discretion to review it. *United States* v. *Williams*, 504 U.S. 36, 41, 42-43 (1992). It is undisputed that the Seventh Circuit squarely rejected petitioners' facial challenge.

Next, respondent argues (Opp. 25-29) that the decision below is not inconsistent with *Shuttlesworth* or *Roach*. Although respondent does not deny that the City Commission wielding standardless authority in *Shuttlesworth* was a legislative body, he suggests that

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[4] Although space does not permit a point-by-point response, respondent's other waiver arguments are equally groundless. Compare, *e.g.*, Opp. 23 n.7 (claiming failure to raise argument that General Assembly is exercising administrative authority in approving plates pursuant to statutory delegation) with Reh'g Pet. 15 (General Assembly is "engaged in a function that is quintessentially *administrative* in nature").

the case involved an administrative rather than a legislative function. But precisely the same is true here. Moreover, the Illinois statute as amended delegates to the General Assembly the authority to "authorize[]" new plates – whether by legislative act or otherwise. Pet. App. 8a; Pet. 3 n.2. In contrast to the respondent's "Fact Sheet," the Illinois statutory amendment does *not* require that a formal law be enacted and signed by the governor, and thus leaves open the possibility that the General Assembly could act in less formal ways.

Respondent also tries to distinguish *Roach* on similar grounds. But the fact that Missouri law includes two methods of obtaining approval of new specialty license plates, or that the parties in *Roach* took note of or mentioned that fact in their briefs, does not mean that the Illinois scheme is qualitatively different. The critical issue is whether it matters that discretionary, standardless licensing authority happens to have been delegated to the General Assembly in this case (rather than a committee whose only voting members are legislators as in Missouri). We say that is a distinction without a difference; respondent disagrees. That dispute goes to the merits of the facial challenge. Respondent cannot make the conflict disappear merely by assuming he is right on the merits. For the same reason, respondent's argument (Opp. 29-30) premised on the disputed assumption that specialty plates are a nonpublic forum also fails.

Finally, respondent argues that petitioners lack standing to pursue a facial challenge. Opp. 31-32. In contrast, the Seventh Circuit held that petitioners had "adequately alleged an injury by reason of the exclusion of their 'Choose Life' message from Illinois's specialty-plate program." Pet. App. 9a n.3. Respondent's theory

is that petitioners could not benefit from their challenge because "[e]ven if Illinois had standards to prevent discrimination against viewpoints on the topics encompassed by its specialty-plate program, those topics do not include abortion." Opp. 31. This argument begs the question of which topics are "encompassed" by the program in the first place. The lower-court cases respondent cites (Opp. 31) are readily distinguishable because they involved permit applicants who indisputably violated other unchallenged and established criteria. In any event, this Court has long recognized that overbroad prior restraints may be subject to facial challenge even where application in the instant case might be constitutionally unobjectionable. See, *e.g.*, *Forsyth County, Ga.* v. *Nationalist Movement*, 505 U.S. 123, 129 (1992).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., ET AL.,

Petitioners,

v.

JESSE WHITE, ILLINOIS SEC'Y OF STATE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICI CURIAE* CHOOSE LIFE, INC.; THE CHILDREN FIRST FOUNDATION, INC.; ARIZONA LIFE COALITION, INC.; CHOOSE LIFE OF MISSOURI, INC.; AND MASSACHUSETTS CHOOSE LIFE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI*[1]

Choose Life, Inc. is a non-profit organization that coordinates state-by-state efforts to authorize the "Choose Life" license plate. Beginning with Florida in 2000, the "Choose Life" specialty plate is now on the road in Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota and Tennessee. "Choose Life" plates are approved and pending issuance in Delaware, Missouri, New Mexico, North Dakota and Virginia. Efforts to authorize the "Choose Life" plate are underway in at least eighteen other states.

The "Choose Life" specialty plate has met with significant political resistance in many states. For example, in spite of the fact that for many years Florida made specialty license plates available in support of a variety of interest groups including universities, sports teams, and environmental and social causes, the bill to authorize the first "Choose Life" plate in that state was challenged every step of the way by those who opposed the message. The legislation failed to pass the Senate Transportation Committee the first year. The application was

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[1] Counsel for the parties received timely notice of the filing of this brief pursuant to Rule 37.2(a) of the Rules of the Supreme Court. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by counsel for a party and that no person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

resubmitted in the 1998 Legislative Session and passed both the House and the Senate with overwhelming majorities, but then-Governor Lawton Chiles vetoed the bill. Resubmitted the following year, the "Choose Life" plate bill passed the House with a wide bi-partisan margin, but met considerable opposition in the Senate, where it was passed in the last 15 minutes of the legislative session by a single vote. On June 10, 1999, Governor Jeb Bush signed the bill into law.

Before the plate could go on sale, however, the National Organization for Women and other individuals opposed to the "Choose Life" message filed multiple lawsuits against the State of Florida to prevent the plate from being issued. Nonetheless, the plate was ultimately issued and the lawsuits were dismissed. *Hildreth v. Dickinson*, No. 99-583-CIV-J-21-A, 1999 WL 33603028, *7 (M.D. Fla. Dec. 22, 1999) (plaintiffs failed to seek authorization for their own "pro-choice" plate); *Women's Emergency Network v. Dickinson*, 214 F. Supp. 2d 1308 (S. D. Fla. 2002), *aff'd*, 323 F.3d 937 (11th Cir. 2003).

In 2007, the "Choose Life" license plate was the eighth best-selling specialty plate of 104 such plates released in Florida. As of April 30, 2008 it was displayed on approximately 40,000 vehicles, with over 324,386 sales or renewals of the plate raising in excess of $6.4 million for adoption efforts. Every "Choose Life" plate sold raises $20 to help pro-women organizations, such as maternity homes, non-profit adoption agencies and pregnancy care centers.

Choose Life, Inc.'s experience in Florida was a harbinger of things to come elsewhere, as the efforts of Choose Life state affiliates have frequently been thwarted by politically powerful groups who dislike its message. Efforts to have the "Choose Life" plate authorized have been stymied by political forces in many states besides Illinois, including California, Minnesota, North Carolina, Utah, Washington and West Virginia. Approved plates in other states have been met with litigation by activists opposed to the "Choose Life" message. *See, e.g., ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006) (litigation opposing Tennessee's "Choose Life" plate); *Planned Parenthood of South Carolina, Inc. v. Rose*, 361 F.3d 786 (4th Cir. 2004) (litigation opposing South Carolina's "Choose Life" plate); *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005), *reh'g and reh'g en banc denied*, 434 F.3d 352, *cert. denied*, 126 S.Ct. 2967 (2006) (litigation by Planned Parenthood affiliate opposing Louisiana "Choose Life" plate). Choose Life, Inc. believes that if the Seventh Circuit's decision stands without review by this Court, these political opponents of the "Choose Life" message will assert that the "controversy" over the message – controversy that they themselves have helped create – is a sufficient and constitutionally defensible reason to exclude it from a public forum for expression.

The Children First Foundation, Inc. ("CFF") is a non-profit organization that serves as the official sponsor of the "Choose Life" specialty plate effort in Connecticut, New York and New Jersey. CFF is dedicated to providing pro-adoption funding and other adoption-related resources for charities that

encourage and facilitate adoption as a positive choice for women facing unplanned pregnancies. CFF's efforts in Connecticut made that state the ninth state in the nation - and the first in the Northeast - to have the "Choose Life" plate on the road in September 2003.

CFF's efforts to bring the "Choose Life" plate to New York began in late 2001. The New York Department of Motor Vehicles rejected the Foundation's design of a crayon drawing of a yellow sun behind the faces of two smiling children, claiming that a significant segment of the population would consider the design "patently offensive" because it also included the words "Choose Life." CFF revised its design by adding the organization's web site address, "fund-adoption.org," but the design was rejected again on the same grounds. In March 2004, the NY DMV Commissioner sent a final rejection letter to CFF, reiterating the same rationale and stating that control over the design, marketing and issuance of any specialty plate was "solely within [his] discretion." CFF filed suit against the New York DMV on August 4, 2004, asking for judicial intervention to allow its plate to be issued, and the case is ongoing. *The Children First Foundation v. Martinez*, No. 04-CV-927 (N. Dist. N.Y.).

In New Jersey, CFF sought authorization for the "Choose Life" plate from the New Jersey Motor Vehicle Commission in January 2003. As a qualified organization, CFF applied for a plate displaying The Children First Foundation's official corporate logo that includes a copyrighted childlike drawing of two

smiling children and the words "Choose life." CFF's organizational plate design used "FUND-ADOPTION.ORG," which was one of CFF's internet domain names, at the bottom of the plate as well as the vertical letters "AD" in its design to further promote adoption. After initial approval was extended, the commission reversed the decision. The reason given for the rejection was that the logo "Choose Life" was too "controversial" and "political." The commission's representative suggested that something "less controversial" be used, such as "Choose Adoption" or "Adopt a Baby." After CFF unsuccessfully sought to communicate with the commission about this decision for nearly five months, the commission sent CFF a letter stating that the governing statutes and regulations disallowed a "slogan" or "advocacy message" on an organizational plate, but failed to cite its authority.

Under protest, CFF proposed to amend its design by removing the words "Choose life" from CFF's corporate logo and substituting "NJCHOOSE-LIFE.ORG" at the bottom of its plate, which was another pre-existing, operational internet domain name and alternate legal name for CFF. The commission once again rejected the design, stating that it would allow "FUND-ADOPTION.ORG" to appear at the bottom of the plate, but not "NJCHOOSE-LIFE.ORG". CFF filed suit in May 2004, and the District Court ruled against it after lengthy proceedings in June 2008. *Children First Foundation, Inc. v. Legreide*, No. 04-2137 (Dist. N.J. Jun. 18, 2008). The case is on appeal before the Third Circuit Court of Appeals. *Children First*

Foundation, Inc. v. Legreide, Appeal No. 08-3131, U.S.C.A. 3 (Notice of Appeal filed July 17, 2008).

If the Seventh Circuit's decision stands without review, CFF believes that the states of New York and New Jersey will regard its reasoning as clear constitutional authority to prohibit use of the phrase "Choose Life" on its specialty plate as an unnecessarily "controversial" topic of political dialogue, rather than what it actually is intended to be – a pro-adoption viewpoint.

Arizona Life Coalition, Inc. is an Arizona nonprofit corporation that provides compassionate care to women who are going through unplanned pregnancies. In June 2002, Life Coalition submitted an application for a specialty plate that would display the organization's official logo, a small graphic of two children's faces and the motto, "Choose Life."

The Arizona License Plate Commission first considered Life Coalition's application in August 2002. Members of the commission raised concerns over whether the general public would believe Arizona had endorsed the message of the "Choose Life" license plate, as well as concerns over whether groups with differing viewpoints would apply for plates. The Coalition filed a revised application, which proposed to include its name in the plate design. In spite of the fact that the Coalition had complied with all the administrative requirements for a specialty plate, the commission denied the group its plate and refused to state the reason for the denial. Life Coalition was forced to file suit in

the District of Arizona in order to secure access to the specialty plate forum. The District Court ruled against the Coalition, but the Ninth Circuit Court of Appeals reversed the decision and ordered the Commission to issue the "Choose Life" plate. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 56 (2008). This Court denied review. *See id.* The state has now approved the "Choose Life" specialty plate pursuant to court order, and recently made the plate available to Arizona Life Coalition's membership, including approximately 40 organizations and 100,000 individuals. The Coalition is concerned, however, that if the Seventh Circuit's decision remains precedential, members of the state legislature will believe they have the constitutional authority to pass legislation directing the commission to once again deny the group and its members their right to display the "Choose Life" plate.

Choose Life of Missouri, Inc. is a nonprofit Missouri corporation organized to further the efforts of not-for-profit crisis pregnancy centers, maternity homes and adoption agencies.

Choose Life of Missouri applied to the Missouri Department of Revenue for a "Choose Life" specialty plate. Because the application fully complied with statutory requirements, the Department referred the application to the Joint Committee on Transportation Oversight, which possessed statutory authority to approve plate applications. Two members of the committee, state senators who described themselves as "pro-choice," submitted a letter to the committee chair opposing the "Choose

Life" plate. The committee accordingly denied the application pursuant to MO. REV. STAT. § 21.795(6). That provision states:

> The committee shall not approve any application if the committee receives a signed petition from five house members or two senators that they are opposed to the approval of the proposed license plate.

Id. Choose Life of Missouri brought suit in the District of Missouri. The District Court struck down the statute as unconstitutionally overbroad, and enjoined the Director of the Department of Revenue to issue the plate. *Choose Life of Missouri, et al. v. Vincent,* No. 4:06-cv-00443-SOW (Dist. Mo. Jan. 23, 2008). The Eighth Circuit Court of Appeals affirmed on March 26, 2009, holding that the law "failed to provide standards or guidelines to prevent viewpoint discrimination" by the committee. *Roach v. Stouffer*, 560 F.3d 860, 868 n.4. (8th Cir. 2009). Choose Life of Missouri remains concerned, however, that if the Seventh Circuit's decision goes unreviewed, politically opposed forces within the state will persuade the legislature that it is not bound by the discretionary decisions former legislatures have made for access to the specialty plate forum, leaving the "Choose Life" message vulnerable to majoritarian whims. *See Choose Life of Illinois v. White*, 547 F.3d 853, 858 n.4 (7th Cir. 2008). If, as the Seventh Circuit has it, "The [legislature] is entitled to authorize specialty plates one at a time," and "It is not required to - and cannot - adopt 'standards' to control its legislative discretion," *id.*, nothing seems to keep it from withdrawing

authorization for specialty plates when and if political winds shift.

Massachusetts Choose Life, Inc. is a non-profit organization that seeks to have a "Choose Life" plate issued by the State of Massachusetts. Funds generated by the "Choose Life" specialty plate will be distributed to qualified charities that assist women with the expenses of a full term pregnancy, such as medical bills, temporary housing, transportation, utility bills, food, maternity clothing, and similar expenses of infants. The state requires 3000 registrations to qualify for a specialty plate, and hundreds of "Choose Life" plates have been ordered to date. However, the precedent established by the Seventh Circuit's decision threatens to end these efforts, as organizations such as Planned Parenthood have already used the argument that a license plate is no place for a "political statement."

SUMMARY OF THE ARGUMENT

The history of First Amendment free speech jurisprudence is the story of a struggle by the federal courts to interpret the Constitution in a manner that protects the right to engage in controversial political speech. As the *Amici*'s Statement of Interests relates, despite the laudable profession of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Court's *Amici* and many of their affiliated organizations have encountered politically-motivated obstacles in more than a dozen states to the public display of a simple

but powerful message, "Choose Life," from those who would censor that message as a threat to their own values. In this case, the Seventh Circuit Court of Appeals' determination that the State of Illinois committed no transgression of the First Amendment by refusing to authorize Petitioners' "Choose Life" plate because of the "controversial" nature of the speech was an astonishing departure from the well-recognized and longstanding purpose behind free speech protections related to speech fora – to ensure that the standards for eligibility to a public forum for expression are not gerrymandered by powerful forces to exclude those whose views are counter-majoritarian.

Moreover, the Court of Appeals' conclusion that no claim of unbridled discretion could be made against the state legislature because legislative assemblies cannot "bind" future assemblies to objective criteria extends an open invitation to the states to refer questions about forum access for "controversial" speakers and topics to legislative bodies, where an unaccountable majority will decide them – inevitably in favor of insulating the public from politically "divisive" minority views. The Seventh Circuit has essentially created a "legislative discretion exception" to a long-standing principle of First Amendment law. The Supreme Court should not permit the precious right of free speech on public ways[2] to become subject to the political whims of a

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[2] *Amici* note that the forum in question is comprised predominantly of First Amendment protected places and means of expression. A specialty license plate is a "mobile billboard" for the private views of the vehicle's owner; he places it on his own private property and displays it to hundreds of other

governing body, without any limitation on its discretion to guard against inevitable viewpoint discrimination.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' UNPRECEDENTED DEPARTURE FROM ESTABLISHED FIRST AMENDMENT CASE LAW PROTECTING ACCESS BY OTHERWISE-QUALIFIED BUT "CONTROVERSIAL" SPEAKERS TO A FORUM FOR PUBLIC EXPRESSION.

"The government violates the Free Speech Clause of the First Amendment when it excludes a speaker from a speech forum the speaker is entitled to enter." *Choose Life Illinois, Inc. v. White*, 547 F. 3d at 859, *citing Christian Legal Society v. Walker*, 453 F. 3d 853, 865 (7th Cir. 2006) (Sykes, J., writing for the court). Disregarding this well-established principle of First Amendment jurisprudence, the Seventh Circuit markedly departed from well-established forum doctrine to deny Choose Life the opportunity to seek the issuance of a "Choose Life" license plate, and in so doing has created a schism in Circuit law on the area of public forum speech that warrants review by this Court.

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private citizens on roadways that constitute traditional public fora, for the purpose of fostering public adherence to his own point of view. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). The only component of this complex delivery system for free speech that is proprietary to the government is the plate itself on which the organization's slogan or logo resides.

The Supreme Court has observed that "protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). Courts must routinely engage in an analysis of the particular forum to determine "when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.*

The Court recently reaffirmed that it has established three types of speech fora - traditional, designated and nonpublic - and that each type involves a different standard for the evaluation of permissible government restrictions on speech. *Pleasant Grove City, Utah v. Summum*, ___ U.S. ___, 129 S. Ct. 1125, 1132 (2009).[3] It is beyond dispute,

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[3] Traditional public fora include "public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 129 S.Ct. at 1132 (citation omitted). Designated public fora are those places where government creates a forum on government property or through a government program which have not traditionally been regarded as a public forum but have been intentionally opened up for that purpose. *Id.* at 1132. Nonpublic fora are fora that are "limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Id.* at 1132. In Petitioners' case, the Seventh Circuit held that the specialty license plate program in Illinois created a nonpublic forum. *Choose Life*, 547 F.3d at 865. The Court's *Amici* do not address the correctness of this determination, except to note that the question is at least debatable and may in fact offer an alternate basis for granting certiorari, since the application of that test by the Seventh Circuit has created a schism amongst the

however, that a constitutional standard common to each type of forum is that limitations on access relating to a prospective speaker's identity and its message must be neutral regarding their emotive impact on the public. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (traditional public forum); *Widmar v. Vincent*, 454 U.S. 263 (1981) (designated public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) (limited public forum); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (nonpublic forum). The Seventh Circuit's failure to guide its decision by this North Star of forum jurisprudence has created conflict with at least the Ninth and Fourth Circuits, and arguably others as well.

The Seventh and Ninth Circuits have come to diametrically opposing conclusions concerning the validity of restricting speech related to "controversial" issues in specialty license plates fora. *Stanton*, 515 F.3d at 971; *Choose Life*, 547 F.3d at 865. In *Stanton*, the court concluded that the State Commissioner's ostensible banishment of the "abortion issue" from the specialty license plate program was improper viewpoint discrimination. *Stanton*, 515 F.3d at 972. The *Stanton* court

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Seventh, Fourth and Ninth Circuits. The Seventh Circuit admitted in its opinion that the Ninth Circuit reached the "opposite conclusion" in *Arizona Life Coalition* a case involving almost identical circumstances. *Choose Life*, 547 F.3d at 865. The Seventh Circuit's decision is also in opposition to the Fourth Circuit's analysis in *Sons of Confederate Veterans, Inc. v. Holcomb, Commissioner of the Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) ("*SCV v. Holcomb*").

determined that "where the government is plainly motivated by the nature of the message rather than the limitations of the forum or a specific risk within that forum, it is regulating a viewpoint rather than a subject matter." *Stanton*, 515 F.3d at 972; *see also Sammartano v. First Judicial District Court*, 303 F.3d 959, 971 (9th Cir. 2002).

Stanton followed the contours of forum doctrine laid out by this Court in *Perry* and later cases. As the Court explained in *Rosenberger*, it is only when the viewpoint expressed is beyond the forum's limited purpose that it may be excluded as ineligible for the forum. In that case, it is regarded as a proper form of "content" discrimination:

> Thus, in determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger v. Rector of the University of Va., 515 U.S. 819, 829-830 (1995), citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 436 U.S. 37, 46

(1983).[4] The Seventh Circuit noted *Stanton*'s reliance on *Rosenberger*, but regarded it as erroneous because, in its own view, exclusion of the "Choose Life" plate was pursuant to a restriction on the subject matter of abortion – in spite of the fact that no such forum topic limitation was articulated by the legislature. 547 F.3d at 866. The Seventh Circuit's egregious misreading of *Rosenberger* has thus created an untenable conflict with the Ninth Circuit.

The Seventh Circuit's decision is also at odds with the Fourth Circuit's well-reasoned decision in *SCV v. Holcomb*, which presented similar circumstances involving an ostensibly content-based legislative ban on all speech related to the Confederate battle flag. *Holcomb*, 288 F.3d at 623. The Fourth Circuit saw through this erroneous application of the content-viewpoint distinction and

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[4] According to the Fourth Circuit, the Fourth and Ninth Circuits stand together in this view, apparently as against the Seventh:

> As the Ninth Circuit has noted, the "coherence of the distinction between 'content discrimination' and 'viewpoint discrimination'" may be seen as "tenuous." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 n. 10 (9th Cir. 2001). "While the former describes the subject matter of the speech, and the latter the specific positions taken on the matter, the level at which 'subject matter' is defined can control whether discrimination is held to be on the basis of content or viewpoint." *Id.* Nevertheless, it is clear from the Supreme Court's decisions that, given a properly defined subject matter, the government is presumptively unable to discriminate among viewpoints about that subject matter.

SCV v. Holcomb, 288 F.3d at 623 n.11.

hewed instead to well-established Supreme Court authority:

> [W]here restrictions or regulations of speech discriminate on the basis of the content of speech, there is an "inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion ..." - in other words, to exercise viewpoint discrimination.

288 F.3d at 624, quoting *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994). Clearly, the Fourth Circuit understood the purpose behind the line of cases protecting against viewpoint discrimination; that purpose is to protect the people's right to express all viewpoints, especially those that are most controversial.

This Court should review the Seventh Circuit's decision to consider whether foregoing the right to express controversial views, a core basis of American free speech jurisprudence, may constitutionally be made a qualification for eligibility to speak in a forum for private expression. Because the Court of Appeals' decision countenances a total ban on "controversial speech" in a forum for citizen expression, a ban that other Circuits have soundly rejected, certiorari is warranted.

II. Certiorari Should Be Granted to Consider the Important Constitutional Question of Whether a Legislative

BODY MAY CREATE A FORUM FOR PUBLIC EXPRESSION WITHOUT PROVIDING CONTENT-NEUTRAL STANDARDS FOR SPEAKER ELIGIBILITY.

The Seventh Circuit's acquiescence to the lack of definitive, established standards for allowing individuals access to Illinois' legislatively created "specialty plate" public speech forum in is a radical departure from the law in other Circuits, as it has been informed by this Court. The Seventh Circuit simply glossed over the crucial importance of establishing explicit standards governing access to a legislatively created forum for public expression, despite this Court's clear direction to the Seventh Circuit in an earlier case:

> The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. *Access to a public forum, for instance, does not depend upon majoritarian consent.*

Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 235 (2000) (emphasis supplied); on remand, *Southworth v. Board of Regents of the University of Wisconsin System*, 307 F.3d 566, 578-579 (7th Cir. 2002) (the Supreme Court's rationale in unbridled discretion cases "compels the conclusion that the requirement of 'viewpoint neutrality' includes as a corollary a prohibition on unbridled discretion").

As the experiences of *Amici* and their affiliated organizations in numerous states amply

demonstrate (*see* Statement of Interests, *supra*, at 1-9), forum access is a particularly critical issue for "Choose Life" groups seeking specialty plate status in states that are politically unreceptive to their message:

> Most states also require that specialty plate applications that meet the minimum requirements be approved in their own pieces of legislation, meaning that both houses of the legislature must pass them and the governor must sign them into law. Thus, applications for specialty plates may also fail at one of the numerous stages in the legislative process.... *[T]here are rarely articulated standards to guide elected officials' judgments. To the extent that they offer explanations for approving or disapproving special plate applications, their explanations relate generally to their perceptions of the public interest and whether the proposed specialty plate would serve it.*

Leslie Gielow Jacobs, *Free Speech and the Limits of Legislative Discretion: The Example of Specialty License Plates*, 53 FLA. L. REV. 419, 426 (2001) (emphasis added). Numerous other legal scholars have noted the intensity of the First Amendment controversy over the standard for speaker access to state specialty plate approval regimes.[5]

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[5] *See, e.g.*, Jeremy T. Berry, *Licensing a Choice: "Choose Life" Specialty License Plates and Their Constitutional Implications*, 51 EMORY L.J. 1605, 1643 (2002); James C. Colling, *General Lee Speaking: Are License Plate Designs Out of the State's Control? A Critical Analysis of the Fourth*

By holding that "one legislature cannot bind a future legislature," and that a legislature "is entitled to authorize specialty plates one at a time" and "is not required to... adopt 'standards' to control its legislative discretion," *Choose Life*, 547 F. 3d at 858 n.4, the Seventh Circuit creates a rift in the long line of cases that have required laws regulating speech fora to include explicit standards for those persons charged with the duty to enforce them. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988) (the absence of explicit standards for forum eligibility "makes it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression"). Even in a nonpublic forum, the Court has cautioned that speaker eligibility criteria must be based on objective, discernible criteria, not on subjective perceptions. *See, e.g., Arkansas Educ. Tel. Com'n v. Forbes*, 523 U.S. 666 (1998).

Circuit's Decision in Sons of Confederate Veterans, Inc. v. Comm'r of the Va. Dept. of Motor Vehicles, 12 GEO. MASON L. REV. 441, 478 (2003); Stephanie S. Bell, *The First Amendment and Specialty License Plates: The "Choose Life" Controversy*, 73 MO. L. REV. 1279, 1302 (2008); Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 692 (2008); Sarah E. Hurst, *One Way Street to Unconstitutionality: The "Choose Life" Specialty License Plate*, 64 OHIO ST. L.J. 957, 998 (2003); Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971, 2023 (2008); Alana C. Hake, *The States, a Plate, and the First Amendment: The "Choose Life" Specialty License Plate as Government Speech*, 85 WASH. U. L. REV. 409, 456 (2007).

> *"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion."* Accordingly, the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so.

Forsyth County Georgia v. Nationalist Movement, 505 U.S. 123, 133 (1992), citing *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (emphasis added; citations omitted).

The Eighth Circuit, in direct contrast, affirms the importance of succinct, definitive direction for forum eligibility to avoid giving government officials unbridled discretion. *Roach v. Stouffer*, 560 F.3d 860, 869 (8th Cir. 2009); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001). Likewise, the Ninth Circuit holds that a legislative body must include specific guidelines in establishing speaker eligibility in a legislatively created forum in order to avoid viewpoint discrimination. *Cogswell v. City of Seattle*, 347 F.3d 809, 816 (9th Cir. 2003); *Sammartano*, 303 F.3d at 965. Moreover, a plethora of Circuit case law stands for the constitutional principle that discretionary decisions regarding government regulation of speech in nonpublic fora require specific limitations and guidelines from legislative

bodies to inform government officials' discretion in determining speaker access.[6]

The Seventh Circuit's decision offers a judicial imprimatur to the many States that would prefer to ban unpopular speech by ceding "unbridled discretion" over access to speech fora to the governmental branch least insulated from majoritarian pressures – the legislative branch.[7]

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[6] *See, e.g, Gannett Satellite Information Network, Inc. v. Berger*, 894 F.2d 61, 65-66, 69 (3rd Cir. 1990); *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386-389 (4th Cir. 2006); *Polaris Ampitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 509 (6th Cir. 2001); *Summum v. Callaghan*, 130 F.3d 906, 919 (10th Cir. 1997); *Atlanta Journal and Constitution v. City of Atlanta Department of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003).

[7] The problem of majoritarianism is compounded by the fact that legislatures are ill-equipped even to *interpret* the content of private speech; Circuit Judge Manion recognized that the "Choose Life" slogan could appeal to sympathizers on *both* sides of the controversial abortion debate depending on one's point of view:

> [T]he message acknowledges both choice and life, so most people who claim to be pro-life and a large number of people who claim to be pro-choice but personally opposed to abortion should be comfortable with this message that is directed at pregnant women who are contemplating abortion. This petition expressly recognizes that it is the woman's choice.

Choose Life, 547 F.3d at 868 (Manion, J., concurring). On the other hand, the Fourth Circuit observed in *SCV v. Holcomb* that the Confederate battle flag was a symbol regarded with reverence by some and with calumny by others. *Compare* 288 F.3d at 624 ("As the Commissioner concedes, the logo would 'advance [the] view that the flag [is] a symbolic

Because the Seventh Circuit gave no credence whatsoever to the constitutional necessity of objective and specific guidelines in regulating public speech fora, contrary to the rule that has been established, with good reason, by this Court and other Circuits, certiorari is warranted in this case.

CONCLUSION

For the reasons stated above, the Court's *Amici* respectfully suggest that a writ of *certiorari* is appropriate to clarify the important constitutional question of whether state legislatures may create public fora for speech, but limit access to those fora by the exercise of "unbridled discretion" to determine whether a proposed speaker or the content of its speech is too "controversial" to permit.

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acknowledgment of pride in Southern heritage and ideals of independence'"); and *id.*, n.12 ("A competing viewpoint of the Confederate flag is that it is 'a symbol of racial separation and oppression.'"). But the problem of reinforcing majoritarian views exists regardless of whether the censored topic is the subject of an even split in public opinion or of an element of a received monolithic cultural worldview, or something in between. For this reason, the Court has cautioned that the First Amendment does not treat all debate as bipolar: "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." *Rosenberger*, 515 U.S. at 831.

Respectfully submitted this 18th day of May, 2009.

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In The
Supreme Court of the United States

CHOOSE LIFE ILLINOIS, INC., *et al.*,
Petitioners,

v.

JESSE WHITE, SECRETARY OF STATE
OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF CONSISTENT LIFE, FEMINISTS CHOOSING LIFE OF NEW YORK, CARE-NET, EXPECTANT MOTHER CARE, GOOD COUNSEL, HEARTBEAT INTERNATIONAL, LUMINA, and THE WOMENS' CENTERS OF GREATER CHICAGOLAND, IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether – after having approved several specialty license plates involving controversial subjects – a State administrator may deny the application of parties who seek to use the specialty license plate rogram to affirm publicly their support for counselling of women in crisis pregnancies and for adoption as a life-preserving alternative to abortion, without engaging in impermissible viewpoint discrimination in violation of the freedom to speak on a controversial issue of public concern on an evenhanded basis with other speakers on controversial issues.

2. Whether – after having approved several specialty license plates involving controversial subjects – a State legislature may deny an application for inclusion in a specialty license plate program without stating any basis for its apparent discrimination against those who submit an application for a license plate with the words "Choose Life" that conforms to every aspect of the legislative program.

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John T. Noonan, Jr., *Persons and Masks of the Law* (1976) 6

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INTERESTS OF AMICI CURIAE

Amici[1] are not-for-profit organizations that engage in advocacy in support of respect for life at all stages. *Amici* also engage in public communication of their convictions with the general society, and in programmatic action to embody the values to which they committed.

We urge this Court to seize this opportunity to address an important and recurring difficulty. Those who seek to surround life with legal protection are frequently denied access to institutions of government on the same footing as others of differing views. For example, applications for inclusion in administrative programs such as the one at issue in this case are rebuffed without an explanation based upon evenhanded application of standards that should normally inform, guide, and control the discretion of administrators.

In this case the court of appeals denied constitutional protection to two words – "Choose Life" – which petitioners voluntarily sought to express publicly when they filed an application with the State of Illinois for participation in the state's specialty license program. The reason offered by the State is that it wishes to *avoid controversy*. As we argue below,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or part, and that no person or entity, other than one of the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief, which is filed with consent of the parties.

neither this rationale nor its indefensible acceptance by the court of appeals passes constitutional muster. Hence, we urge this Court to grant the petition because the constitutional analysis adopted by the court of appeals is severely out of joint with the obligation of governmental nondiscrimination when it comes to deciding who may or may not express a controversial idea. To avoid repetitious briefing, we rely upon legal history to show that protection of controversial speech on matters of public importance lies at very core of First Amendment's purposes.

Consistent Life (CL) is a coalition of activists who support the consistent ethic of reverence for life. *Feminists Choosing Life of New York* (FCLNY) is a nonpartisan, nonsectarian organization that seeks to return to the grassroots of pro-life feminism. Their interests are more fully elaborated in Appendix A. These two lead *amici* have appeared before this Court as *amici* when pro-life activists were threatened with severe penalties under the federal Racketeer-Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968. See *Scheidler et al. v. National Organization of Women* (*Scheidler II*), 537 U.S. 393 (2003), and *Scheidler et al. v. National Organization of Women* (*Scheidler III*), 547 U.S. 9 (2006).

These two *amici* now return in this case to urge the Court to clarify that viewpoint discrimination is never permissible – even when a State attempts to justify it by *banning all communication on a hot topic by both sides to an issue that the State decides is too controversial to be expressed in a forum that the State has already opened to many controversial views.*

In the *Scheidler* case, *CL* and *FCLNY* took the opportunity to locate that particular controversy – one that lasted for two decades – within the historical framework of the "central meaning of the First Amendment" expressed recurrently throughout the Nation's history: that speech in America, especially on divisive issues, must remain "uninhibited, robust, and wide-open." *New York Times v. Sullivan* 376 U.S. 254, 270 (1964).

In this case *CL* and *FCLNY* are joined by numerous organizations and networks that offer therapeutic support to women before, during, and after a pregnancy: *Care-Net, Expectant Mother Care, Good Counsel, Heartbeat International, Lumina,* and *Womens' Centers of Greater Chicagoland*. These *amici* offer care to pregnant young women who experience a range of conflicting and often painful emotions as they struggle to reach a decision about what to do about a crisis pregnancy. These organizations also offer a realistic possibility – adoption – that many women prefer to the reality of abortion that is frequently the only "way out" of the crisis they experience as they go through their pregnancies. More particular descriptions of the mission and purpose of the *amici curiae* are found in Appendix A.

REASONS FOR GRANTING THE PETITION

I. In Acknowledged Conflict with Other Circuits, the Court of Appeals Has Eroded the Historical Commitment to Governmental Nondiscrimination with Respect to Religious and Political Convictions by Allowing a State that Had already Permitted Expression of Viewpoints on Many Controversial Issues to Deny any Expression on the Subject of Abortion on the Ground that the Subject Matter itself – Whether a Speaker is "Pro-choice" or "Pro-life" – Is Too "Controversial."

A. Introduction: The Duty of Nondiscrimination

This case offers this Court an opportunity to clarify that, precisely because Americans profoundly disagree with one another over many aspects of abortion,[2] the government may not discriminate against the expression of one side or another in any public forum.

Petitioner "Choose Life Illinois" (CLI) is a not-for-profit corporation dedicated to promoting the adoption of children and increasing public awareness about adoption as an alternative to abortion. Over 26,000 citizens of Illinois have petitioned the State for a specialty automobile license with two words on the

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[2] A Gallup survey released on May 15, 2009, found that 51 percent of those questioned call themselves "pro-life" on the issue of abortion and 42 percent "pro-choice." Although moral questions are not settled by opinion polls, this Court did not – as the *New York Times* prematurely announced on January 24, 1973 – "settle abortion issue" in deciding *Roe v. Wade*, 410 U.S. 113 (1973).

plate: "Choose Life." Pet.App.65a. Respondent Secretary of State denied the application, and this litigation ensued.

In its motion to dismiss, the State suggested that it could legitimately deny the CLI application because the *viewpoint* that CLI sought to express on the auto license "*is controversial*." Pet.App.50a (emphasis added). The district court correctly rejected the State's blunt statement of the source of its assumed power to abridge the free expression of the CLI perspective on abortion simply because its "viewpoint is controversial," or because "the state wishes to suppress what it considers a controversial idea, discriminating against a viewpoint with which it does not agree or wish to associate." *Id.*

On appeal, the State proposed a different rationale for the denial of the CLI application: that the denial was based on a policy of excluding "the entire subject of abortion" from the specialty-plate program. Accepting at face value[3] this rationale for the state's rejection of the CLI application, the court of appeals reversed, finding that the State had engaged in permissible content-based discrimination. Pet.App.25a. In so doing, the Seventh Circuit acknowledged that its decision was in clear conflict with the "opposite conclusion" of the Ninth Circuit in *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956

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[3] Petitioners note that this rationale was unwritten, previously unarticulated, and unsupported by any evidence in the record. Pet. 7.

(9th Cir.), *cert. denied*, 129 S. Ct. 56 (2008). Pet.App.19a-20a.

The lower court also misread this Court's clear teaching on nondiscrimination in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). Pet.App.24a,26a-27a. Granting the petition would enable the Court to clarify that it is equally unconstitutional when a State opens up a forum such as the specialty license plate program involved here to a medley of 60 categories (some of which are undeniably "controversial"), but then specifically (and only in this instance in the entire history of the Illinois specialty license program) excludes expression of any viewpoint – whether for abortion or seeking to foster an alternative to abortion – in this forum because the government purportedly decides to exclude "the entire subject of abortion" Pet.App.25a,27a-28a. *See also Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* 473 U.S. 788, 812 (1985) ("purported concern to avoid controversy ... may conceal a bias against the viewpoint advanced by the excluded speakers")

B. Consensus and Conflicts in American History

In the spirit of the common law tradition, our courts – including this one – announce general rules that are bound up with the facts of particular cases. *See, e.g.* JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW (1976). In this sense legal method, including constitutional analysis, is deeply engaged in historical method. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). It situates judicial interpretation within the matrix of changing fact patterns at differing moments in time. Hence, in

this brief *amici* offer reflections on legal history that we think support granting the petition in this case.

At the heart of historical reflection on the American Constitution are two very different approaches. The first emphasizes the achievement of a powerful *consensus* and agreement over the fundamentals of our nation. This view celebrates the historical achievement of a written constitution that has for centuries served as a unifying force in our pluralist society. This approach is warm without being fuzzy. It locates the historical context of the central doctrines of constitutional law. For example, in this perspective *separation of powers* is recognized as a bulwark against the abuse of concentrated power in totalitarian regimes. *Due process of law* is seen as a set of procedural safeguards adopted in part because our ancestors sought to preserve English liberties more carefully than the imperial rulers in London – King George III and the Parliament – who failed to give a fair or full hearing to the "humble petitions" for redress of grievances sent to them by our colonial ancestors at the time of the Stamp Act. *Equal protection of the laws* is the basis for rejection of many forms of irrational discrimination, primarily on the basis of race or gender, that had been allowed in our constitutional order at the outset. *First amendment values* have secured both freedom of religion and freedom of expression by raising the bar for human interaction beyond mere toleration to a deeper sense of respect for genuine differences. In short, the consensus view of American history urges that this constellation of constitutional values has made our country a safe place for peoples of many diverse backgrounds and convictions.

Without denying any of the basic themes of the consensus approach, the second approach notes that the achievement of harmony over fundamental ideas that now unify us was not present at the dawn of the Republic, and occurred only because of many painful and costly *conflicts*. This approach emphasizes that enormous struggles preceded the shift from original sins of inequality vis-à-vis the African slaves and their descendants. Thus, a recurrently bitter struggle over slavery lasted for than ninety years after the Declaration of Independence – with its acknowledgement of the self-evident truth that "all men are created equal," 1 Stat. 1 (1776) – until the textual amendments of the Constitution in the Thirteenth, Fourteenth, and Fifteenth Amendments in 1865, 1868, and 1870.

Similarly, the original Constitution was deficient in that it refused to include American women within the full role of citizens entitled to vote, hold public office, and serve on juries as representatives of the community. Although women were deeply engaged in the early nineteenth-century struggle to abolish slavery, they also needed to launch a major nationwide movement for their own full inclusion in constitutional protections, grounded in the equally self-evident truth that "all men *and women* are created equal." *Declaration of Sentiments of the Seneca Falls Convention* (1848). Like the founding Fathers in Philadelphia in 1787, the political establishment that controlled the process of drafting, proposing, and ratifying the Fourteenth Amendment was all-male, and refused to heed the sentiments expressed at Seneca Falls two decades earlier. Because the cause of women was betrayed once again, suffragists had to undertake yet another mass movement to redress their

grievances. The struggle to achieve equal political and civil rights for women was postponed for at least seventy years until the adoption of the Nineteenth Amendment in 1920.

These momentous textual changes in the Constitution, moreover, did not suffice to overcome invidious discrimination on the basis of race and gender after 1920. Decades later, the civil rights movement and the subsequent movement for gender equality continued as powerful struggles to achieve through statutes and litigation a fuller sense of equal dignity for the descendants of slaves and for women in our society. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

Neither approach to constitutional interpretation is sufficiently descriptive of the American experience. Neither approach by itself accounts for the fundamental values we now espouse. The very fact that our current consensus has been achieved at the very high cost of bloody conflicts is itself a reminder that we must cherish a deep commitment to freedom of expression of conflicting views as a powerful nonviolent alternative for seeking constitutional consensus on issues that continue to divide the American people deeply.

C. The Duty of Government is Not to Police or Eliminate Conflict, But to Let it Thrive by a Policy of Nondiscrimination

The conclusion of the court of appeals in this case is also in glaring conflict with this Court's teaching on the duty of nondiscrimination in matters affecting both

religious beliefs and political decisions. *See Agostini v. Felton*, 521 U.S. 203, 230-31 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Convictions of religion and conscience, of the heart and the mind, are normally beyond the competence and ken of the government to decide, influence, or control. Our history repeatedly teaches that the government's job is *neither to police controversies nor to eliminate them* from our society. On the contrary, the *consensus* that emerges from our historical experience is that the government should let nonviolent *conflict* thrive, and should allow arguments to be assessed and rebutted by counterclaims and more persuasive arguments. The duty of governmental nondiscrimination is especially germane to issues as controversial as abortion.

D. Examples of Free and Open Conflict on Controversial Themes in American Constitutional History

As noted above, the baseline for the fundamental norm of freedom of expression is not that consensus is easily manufactured by the government, but that conflict over different approaches is itself normative when it comes to deciding how best to "establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." U.S. Const., Preamble.

For example, at the very dawn of the Republic some colonists – notably John Adams, Benjamin Franklin, Patrick Henry, James Madison, Thomas Jefferson, and

George Washington – favored "independency." Many others sought to remain loyal to the Crown. In this instance, the disagreement was open, but hardly "free." Tories or Loyalists were often dispossessed, tarred and feathered, and exiled to Canada or England. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1993).

After the Constitutional Convention of 1787, James Madison, Alexander Hamilton, and John Jay wrote under the pen name of "Publius" to encourage the ratification of the proposed Constitution in the convention of the State of New York. THE FEDERALIST PAPERS, as these pamphlets or lengthy op-eds came to be known, are revered by some as a masterful commentary on the Constitution. But in another important body of pamphlets Anti-Federalists strongly and openly opposed ratification of the Constitution, in part because of its lack of a Bill of Rights cabining the authority of the federal government, which had been given many powers it hitherto lacked under the Articles of Confederation. *See, e.g.*, THE COMPLETE ANTI-FEDERALIST (HERBERT STORING and MURRAY DRY EDS., 7 vols., 1963-1981). The very fact that debate on this crucial matter was "uninhibited, robust, and wide-open" led Madison himself to change his mind about the need for a Bill of Rights, which he championed in the First Congress. The *consensus* for ratification was thus born out of *conflict*.

In the very first administration President Washington sought the views of the Secretary of State and of the Secretary of the Treasury over the constitutionality of a proposal to establish the Bank of the United States. Basing his view on a strict construction of the federal powers enumerated in

Article I, § 8 of the Constitution, Thomas Jefferson urged that the proposal was unconstitutional. Alexander Hamilton – employing a theory of implied rights – argued that the creation of a national bank was constitutional. This famous split of opinion in the first Cabinet sowed the seeds for the emergence of competing political parties. This Court eventually adopted Hamilton's approach, *McCulloch v. Maryland*, 17 U.S. (4 Wheaton) 316 (1819), but once again *consensus* was born out of *conflict*.

As the country lurched from one compromise over slavery to another, abolitionists and upholders of slavery vociferously advocated opposing views on this burning issue. *See, e.g.*, HENRY MAYER, ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY (2008); PHILLIP S. PALUDAN, A COVENANT WITH DEATH (1975). For example, Senator Stephen Douglas and former Congressman Abraham Lincoln debated one another often about the politics and morality of slavery. These encounters throughout Illinois provide another example of "uninhibited, robust, and wide-open" debate. The State of Illinois did not then imagine that it could open a forum only to Douglas or Lincoln, and it did not – as in the present case – ban both Douglas and Lincoln because the subject matter of slavery and its abolition was too "controversial."

Shortly before the Lincoln-Douglas debates, this Court attempted its own form of compromise on slavery in its 5-4 decision in *Dred Scott v. Sandford*, 60 U.S. (19 Howard) 393 (1857). Nearly every newspaper in the country ran accounts of the decision on their front pages and discussed the opinion in heated editorials. No matter what the views expressed on the

Court's opinions, nearly all realized that the time for compromise had passed. *See*, e.g., DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS (1978). The house divided did not stand. Because there was no *consensus* on racial equality, horrific *conflict* ensued. As Lincoln said in his Second Inaugural, "And the war came."

The eminent abolitionist Frederick Douglas wrote of the Emancipation Proclamation: "The first of January, 1863, was a memorable day in the progress of American liberty and civilization. It was the turning-point in the conflict between freedom and slavery. A deathblow was then given to the slaveholding rebellion." Within days, the Illinois legislature passed a resolution condemning the proclamation as "unwarrantable in military as in civil law; a gigantic usurpation ..., a revolution in the social organization of the Southern States ... [that] invites servile insurrection ... a means of warfare, the inhumanity and diabolism of which are without example in civilized warfare, ... which the civilized world will denounce as an uneffaceable disgrace to the American people." *Illinois State Register* (Springfield, Jan. 7, 1863) at 1. No one in Rochester gagged Douglass. No one in Springfield stopped the Legislature from criticizing the President on a controversial matter.

E. Examples of Overt Abridgment of Speech on Viewpoints Contrary to Those Held by Public Officials

1. *Sedition Laws.* Sometimes the political branches sought to suppress unpopular viewpoints by overtly

targeting political opposition to the government as "seditious." Perhaps the most notorious example of this sort of abridgement of free speech was the Sedition Act of 1798, 1 Stat. 596. By its terms, it was self-interested partisan legislation, not an Act designed to avoiding sedition. The Federalists carefully inserted a "sunset clause" allowing the Act to expire in 1801, so that if Jefferson won the election of 1800, the Act could not be used against Federalists for opposing the Jefferson administration. JOHN CHESTER MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1952). Although this Court never ruled on the constitutionality of the Sedition Act, the Virginia Resolutions (drafted by Madison) clearly repudiated the Act as unconstitutional and the federal government subsequently enacted and carried out a program of reimbursement of fines levied under the Act. *New York Times v. Sullivan* 376 U.S. 254, 274-76 (1964).

During World War I Congress enacted a sedition law that rendered illegal the use of "disloyal, profane, scurrilous, or abusive language" about the United States, or saying or publishing anything "tending to bring the government into disrepute." The war was over by the time the first case on this legislation reached this Court, which unanimously sustained the conviction of the general secretary of the Socialist Party for distribution of antiwar pamphlets to potential draftees. *Schenck v. United States*, 249 U.S. 47 (1919). The Court also sustained the conviction of Eugene Debs, a prominent labor leader and candidate for the presidency, for a campaign speech he delivered against American involvement in World War I. *Debs v. United States*, 249 U.S. 211 (1919). And the Court sustained the conviction of an anarchist for

distributing leaflets denouncing President Wilson's short-lived invasion of the Soviet Union and calling for a general strike in New York. *Abrams v. United States.* 250 U.S. 616 (1919).

Thousands served long jail terms during both world wars, solely because of their conscientious objection to these wars. *See, e.g.*, THESE STRANGE CRIMINALS: AN ANTHOLOGY OF PRISON MEMOIRS BY CONSCIENTIOUS OBJECTORS FROM THE GREAT WAR TO THE COLD WAR (PETER BROCK ED. 2004). Few, if any, of these convictions would now be affirmed under the approach to protection of free speech that this Court adopted during the Vietnam War. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969), reversing *Whitney v. California*, 274 U.S. 357 (1927).

No matter what one thinks of the tendency to diminish the protection of civil liberties during wartime, *see, e.g.*, WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES DURING WARTIME (1998), the consensus that has now emerged in this Court on freedom of speech surely means that no governmental agency could have banned discussion of waterboarding by *both* Senators McCain and Obama during the past presidential campaign on the view that this form of torture is "controversial." *See, e.g., Hudson v. McMillian*, 503 U.S. 1, 26 (1992) (Thomas, J., dissenting) ("water torture" violates Eighth Amendment prohibition against cruel and unusual punishment).

2. *Gagging discussion of abolition.* From 1836 to 1844 the House of Representatives regularly adopted a rule prohibiting presentations of petitions urging the abolition of slavery in the District of Columbia. In 1836

the Senate rejected a gag rule, while adopting a procedure that had the same effect. John Quincy Adams, the only former President to serve in the House of Representatives, constantly urged that the gag rule adopted by the House notoriously ignored the limits on its power set by the provision in the First Amendment commanding Congress to "make no law ... abridging the right of the people ... to petition the government for a redress of grievances." Adams eventually prevailed when the gag was rescinded in 1844. *See, e.g.*, WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: JOHN QUINCY ADAMS AND THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1995).

During the height of abolitionist fervor, Northerners frequently sought to influence the national debate by writing or sending books about the "peculiar institution" to Southerners. In reaction to this pressure of "outside agitators," slave-state legislatures attempted to suppress this communication as "seditious." Section 26 of the Virginia Sedition Law (enacted in 1831-1832, 1835-1836, 1847-1848) imposed criminal sanctions on any free person who "by speaking or writing, maintain[s] that owners have not right of property in their slaves." THE CODE OF VIRGINIA 809 (1860). Section 28 of this *state* law even purported to fine or imprison *federal* postmasters who failed to burn books that "aid the purposes of abolitionists" by "inculcating resistance to the right of property of masters in their slaves." *Id.* And President Andrew Jackson's Postmaster General informally sought to ban delivery of abolitionist literature by the U.S. Post Office in the South. SLAVERY ATTACKED 41,52 (JOHN L. THOMAS ED. 1965).

F. Silencing All Viewpoints on Controversial Matters Violates the Governmental Duty of Nondiscrimination in Political Speech

After the enactment of the Thirteenth Amendment, it is easy to see that the Sedition Act of Virginia is unconstitutional. But even before the Thirteenth Amendment, legislation of this sort violated the First Amendment. This is not an anachronistic judgment made with twenty-twenty hindsight. It is the view of a leading abolitionist, William Ellery Channing, who wrote at the time of the reenactment of the Virginia law:

> Of all powers, the last to be entrusted to the multitude of men, is that of determining what questions shall be discussed. The greatest truths are often the most unpopular and exasperating: and were they to be denied discussion, till the many should be ready to accept them, they would never establish themselves in the general mind. The progress of society depends upon nothing more, than on the exposure of time-honored abuses, which cannot be touched without offending multitudes, than on the promulgation of principles, which are in advance of public sentiment, and practice, and which are constantly at war with the habits, prejudices, and immediate interests of large classes of the community. Of consequence, the multitude, if once allowed to dictate or proscribe subjects of discussion, would strike society with spiritual blindness, and death. The world is to be carried forward by truth, which at first offends, which wins its way by degrees, which the many hate and would rejoice to crush. The

> right of free discussion is therefore to be guarded by the most sacred, and the most endangered of all our rights. William E. Channing, *Letter to James G. Birney* (Nov. 1, 1836).

The great abolitionist and early feminist Susan B. Anthony noted "It was we, the people; not we, the white male citizens; nor yet we, the male citizens; but we, the whole people, who formed the Union." As noted above, in 1848 she and Elizabeth Cady Stanton and the other participants at the Seneca Falls Convention added two critical words – "*and women*" – to the self-evident truth about those who are "created equal." The women of Seneca Falls aptly described the injustice of exclusion of women from participation in the republic as full citizens in the language of a public grievance, redolent of the long lists of grievances set forth against concentrated, monarchical power in the Declaration of Independence:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. He has never permitted her to exercise her inalienable right to the elective franchise. He has compelled her to submit to laws, in the formation of which she had no voice. He has withheld from her rights which are given to the most ignorant and degraded men--both natives and foreigners. Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

1 THE HISTORY OF WOMAN SUFFRAGE 70 (ELIZABETH CADY STANTON, SUSAN B. ANTHONY, AND MATILDA JOSLYN GAGE, EDS, 1881).

In both instances – abolitionism and inclusion of women in the prerogatives and duties of full citizenship – public officials attempted to stifle or prohibit the discussion of controversial ideas. Neither of these examples of muzzling and gagging is a curious relic of the past. Both experiences are illustrative counter-examples of the current doctrine of this Court. For example, in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court ruled that where a public university had allowed the use of student fees for a Jewish student organization and a Muslim group, it violated the First Amendment guarantee of Free Speech when it withheld funding to a student publication that "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality." 515 U.S. at 823. The dissent argued that there was no viewpoint discrimination because the university had limited *all* religious speech, both theistic and atheistic.

This is precisely the argument of Respondent in this case: that the state may exclude from its specialty plate program not only a message such as the one that petitioners seek to express ("Choose Life"), but also a message such as that approved for specialty plates in Montana ("Pro-Family, Pro-Choice)."[4] This is precisely the sort of *blanket exclusion of a controversial theme*

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[4] See http://www.choose-life.org/states.htm (last visited May 15, 2009). Petitioners have no objection to Illinois approving a "pro-choice" plate. Pet. 10, note 8.

from a public forum that *Rosenberger* rejected: "If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one."[5] 515 U.S. at 831. Hence, this Court's review is now necessary to resolve the disagreement over the meaning of *Rosenberger* and its implications for the dividing line between viewpoint and content-based discrimination.

II. In Acknowledged Conflict with Other Circuits, the Court of Appeals Eroded the Understandings that Standardless Regal Power is "Absolute Tyranny" and that Standardless Administrative Authority is Arbitrary

A. Introduction: The Absence of Meaningful Standards in the Illinois Specialty License Plate Scheme

Respondent acknowledges that he may not "*arbitrarily* begin issuing a new plate category." Pet.App.62a, 10a-11a. Neither the state not the court of appeals takes this point seriously enough. Respondent states an obvious truth that no parliament can bind a subsequent one, Pet.App.27a, but never explains why a legislative body that takes over various administrative functions is not thereby responsible for

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[5] In rejecting Arizona's argument that its licensing scheme did not constitute viewpoint discrimination, the Ninth Circuit directly relied on this passage in *Rosenberger*. *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 971 (9th Cir.). The Seventh Circuit expressly disagreed with the Ninth Circuit's reading of *Rosenberger*. Pet.App. 26a-27a.

the same articulation of standards meant to inform, guide, and control administrative agencies and thus comply with the nondiscrimination principle discussed in this brief in Part I above. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

The court of appeals repeated the point that a legislature cannot bind a future one, Pet.App.11a. But it did not explain how any state legislature escapes the command of the Fourteenth Amendment: "No State shall...." It ignored the teaching of this Court that lack of standards generates arbitrariness. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393-94 (1992); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757-58 (1988); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951); *Thornhill v. Alabama*, 310 U.S. 88,97 (1940). And it provoked a circuit conflict by acknowledging important differences with other circuits on this very issue. Pet.27a-30a.

B. From the Revolutionary Rejection of Despotic and Tyrannical Power to the Insistence on Administrative Procedures to Inform, Guide and Control Governmental Discretion, Written Standards Have Been a Hallmark of American Constitutionalism

To help situate the decision on whether to grant certiorari in this case, *amici* offer some historical notes on the connection between the complete absence of any meaningful standards in the Illinois statutory and administrative regime dealing with specialty license plates and the arbitrary denial of the application sought by over 26,000 citizens of Illinois to express

their viewpoint on adoption as an alternative to abortion.

The connection between written standards and the rejection of arbitrary power has been a central theme in American constitutional history. From the dawn of the Republic to the burgeoning of multiple administrative agencies in the mid-twentieth century, America has insisted upon written constitutional norms and standards to guard against the recurrence of standardless, arbitrary power.

When the British imperial forces surrendered in 1781 at Yorktown to the improbable republican victors under the command of General Washington, the military band played "The World Turned Upside Down." European power was regal, and therefore concentrated. In most instances, regal power was also imperial, governing indigenous peoples and colonial settlers from the capital of the empire, minimizing the capacity of these people to govern themselves. In "the new order of the ages," it is not a monarch, but the People who are sovereign and who ordain and establish a written constitution granting some powers (e.g., Art.I,§8; Amend. XIII, §2) and refusing others (e.g., Art.I,§§9-10; Amend. I-VIII) to their elected representatives.

The Declaration of Independence states several "self-evident" truths as central principles of the American Revolution:

> That all men are ... endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights,

> governments are instituted among men, deriving their just powers from the consent of the governed. 1 Stat. 1 (1776).

The British Constitution set limits – then and now – upon royal power, but the very fact that this form of constitutionalism is *unwritten* led in the American experience to the conclusion that concentrated power of an imperial monarch was "absolute despotism" and "absolute tyranny":

> a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism .... The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. *Id.*

The bulk of the Declaration is a long statement of unredressed grievances that the colonists had addressed to the Crown in "humble petitions," all of which went unheeded and unanswered. The failure to grant a full and fair hearing to these grievances made "due process of law" a rallying cry of the American Revolution: "whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." *Id.*

Having declared their right and duty to throw off tyrannical and despotic government, the

revolutionaries immediately set about the task of providing "new guards for their future security" by establishing *written constitutions* in the independent states, each of which separated powers and secured religious and civil liberties and fair procedures to serve as safeguards against the *arbitrary, standardless,* concentrated, and unresponsive power of an imperial monarchy against which the revolutionaries rebelled. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1789 (1969).

In Part I above, we noted examples of abridgement of freedom of speech directly targeting those seeking to end slavery and exclusion of women from full participation in civic life. We note now that when state or local officials have refused to issue a permit to assemble peaceably, to march in protest against perceived injustices, or to distribute literature from door to door (sometimes in very public spaces such as a sidewalk, an airport, or a state fair ground), the underlying cause of the problem has often been that decision-makers (whether in the legislative or executive branches of state and local governments) who determine access to a forum have operated without any standards to inform, guide, or control their discretion. *See generally*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE (1977).

Amici note, moreover, that those who have been deterred in engaging in expressive activity have often been members of racial or religious minorities. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Niemotko v. Maryland*, 340 U.S. 268 (1951), *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981).

Thus, the fact of *standardlessness*, at the heart of the second question presented by petitioners, has in American history been frequently been linked closely to the violation of the duty of *governmental nondiscrimination*, at the heart of the first question presented by petitioners. The Court should grant the petition and resolve both of these recurring and important questions.

CONCLUSION

For the reasons stated above, *amici curiae* urge the Court to grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

PARTICULAR STATEMENTS OF INTEREST

Consistent Life (CL) is a network uniting many organizations and individuals who support the consistent ethic of reverence for life. Its mission is to protect life, which is threatened in today's world by war, abortion, poverty, racism, capital punishment and euthanasia. CL believes that these issues are linked under a "consistent ethic of life." CL challenges those working on all or some of these issues to maintain a cooperative spirit of peace, reconciliation, and respect in protecting the unprotected. See www.consistent-life.org

Feminists Choosing Life of New York (FCLNY) is a nonpartisan, nonsectarian organization that seeks to return to the grassroots of pro-life feminism. In the tradition of early American feminists such as Susan B. Anthony and Elizabeth Cady Stanton, FCLNY operates from the core ideals of justice, nondiscrimination and nonviolence. It is an active voice for a consistent life ethic through our education, advocacy and outreach efforts, especially on college campuses. FCLNY aims to promote a culture in which women can choose life from conception to natural death. See www.feministschoosinglife.org

Care-Net, Inc. is an evangelical ministry whose mission is to promote a culture of life through the delivery of valuable, life-affirming, care to people facing unplanned pregnancies and related sexual

issues. It implements this mission by supporting a network of over 1,100 pregnancy centers in North America and by operating an Option Line call center and website that assist women in need around the clock, 365 days a year. Its vision is to help build a culture of life in which every pregnant woman is offered the support she needs to choose life for her unborn baby. See www.care-net.org

Expectant Mother Care (EMC) is a full-time pregnancy resource center in New York City, with 12 locations in four NYC boroughs, 3 suburban locations, and a mobile clinic. EMC was the first pregnancy center in the world with state-of-the-art 4-dimensional ultrasound unit of GE Healthcare Services, and it operates a 24-hour hotline in New York City. See http://emcfrontline.org

Good Counsel is a not-for-profit corporation that supports homeless pregnant mothers and single mothers with babies. It operates five homes in New York State and has helped to establish similar programs in eight other states. Good Counsel also conducts post-abortion counseling and a referral network. Additionally, Good Counsel operates separate national *Helplines* for post-abortion and crisis pregnancies. See www.goodcounselhomes.org

Heartbeat International is a nonprofit, interdenominational Christian association of faith-based pregnancy resource centers, medical clinics, maternity homes, and nonprofit adoption agencies endorsed by Christian leaders nationwide. Heartbeat's Life-Saving Vision is to help create a world where every new life is welcomed and children are nurtured within strong families, according to God's Plan, so that

abortion is unthinkable. See www.heartbeatinternational.org

Lumina is a post-abortion referral network of women and men who have experienced the pain of abortion, including feelings of anxiety, panic, grief, guilt and shame, and who offer to others a message of hope and healing after an abortion that is often a way out of the pain that many experience. Lumina's services include group programs, referrals to professional therapists, post-abortion ministries, and clergy members trained in post abortion stress. See www.postabortionhelp.org

Womens' Centers of Greater Chicagoland is a not-for-profit organization, whose purpose is to reach desperate pregnant women with a message of hope and help. The Women's Centers counsel over 6,000 pregnant women per year, including providing over $500,000 annually in tangible assistance in clothing, food, baby goods, furniture, toiletries, and other basic family needs.